87-368

No. - .

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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August 31, 1987

QUESTIONS PRESENTED

1. Whether a corporation may be convicted of a felony as to which Congress required specific intent, even if none of its employees ever knowingly or intentionally violated the law.

2. Whether a statute by which Congress provided felony liability only for "[a] person violating" the law "as part of a pattern" of violations authorizes a separate felony conviction for each violation that is part of such a pattern, an issue as to which the circuits are divided.

RULE 28.1 STATEMENT

Petitioner Bank of New England, N.A., is owned by the BNE Massachusetts Corporation, which in turn is owned by the Bank of New England Corporation, a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit has not yet been reported, and is attached as Appendix A to this Petition.[1] The underlying judgment of

[1] Citations to the appendix to this Petition will be denoted "A. ___." Citations to the record as reprinted in the appendix submitted to the court of appeals will be denoted 1st Cir. App. ___.

conviction in the United States District Court for the District of Massachusetts (Zobel, J.), entered upon jury verdict, is unreported. The memorandum decision denying petitioner's motions to dismiss is reported at 640 F. Supp. 36 (D. Mass. 1986).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 10, 1987. *See* Appendix B. Rehearing was denied on July 6, 1987. *See* Appendix C. On July 17, 1987, Associate Justice Byron R. White ordered the mandate of the Court of Appeals recalled and stayed pending the filing and disposition of this petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides in relevant part that:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Bank Secrecy Act, 31 U.S.C. § 5313(a), provides:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency . . . in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Felony liability is imposed under 31 U.S.C. § 5322(b):

> A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.[2]

STATEMENT OF THE CASE

This is a case about the limits of judicial power to expand the reach of the federal criminal law beyond the bounds Congress has set. Two issues are presented. The first is whether the courts are free to treat a corporation's inaction as equivalent to the "willfulness" required by Congress. The second is whether the courts are free to construe an undeniably ambiguous felony enhancement provision so as to choose the most punitive possible interpretation from among several admittedly plausible alternatives.

This case arose under the Bank Secrecy Act and its implementing regulations. Those regulations require banks to file reports of currency transactions of more than $10,000.[3] At the time covered by the indictment, willful violations of those regulations were misdemeanors, and only a pattern of such misdemeanors triggered felony liability.[4] Petitioner, the Bank

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[2] The statute has since been amended to extend the maximum prison term under this provision to ten years, an amendment not relevant here.

[3] During the period covered by the indictment, financial institutions were required to file a report "of each deposit, withdrawal, exchange of currency or other payment or transfer . . . which involves a transaction in currency of more than $10,000." 31 C.F.R. § 103.22(a)(1) (1985).

[4] During the period covered by the indictment, 31 U.S.C. § 5322(a) provided that "[a] person willfully violating" the reporting regulation "shall be fined not

of New England ("the Bank"), was charged and convicted of 31 separate felonies, and fined a total of $1.24 million, because it failed to report a series of cash withdrawals by a customer at one branch, James McDonough.

At the time these withdrawals were made, it was far from clear that they were reportable as a matter of law. While there is no dispute that, on 31 occasions, Mr. McDonough withdrew more than $10,000 in currency from the Bank, he did so on each occasion by using a series of counter checks, each for less than $10,000. *See* 1st Cir. App. 2129-48. The federal government itself was deeply divided at the time about whether transactions so structured were reportable.[5] Indeed, it was not until this year — well *after* the trial and conviction in this case — that the Treasury Department finally amended the regulations to require reports of such multiple transactions.[6]

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more than $1,000, imprisoned for not more than one year, or both." 31 U.S.C. § 5322(b) provided that "[a] person willfully violating" the reporting regulation "as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both." 31 U.S.C. § 5322(a) has since been amended to provide for a fine of not more than $250,000 and/or imprisonment for not more than five years, thus making any violation a felony, but this amendment is not relevant here.

[5] The Comptroller General of the United States had specifically criticized the Secretary of the Treasury for failing to make clear any duty to report such structured transactions. As the Comptroller General pointed out: "The regulations were silent on the propriety of a customer's conducting multiple transactions to avoid reporting. . . . [A]lthough the regulations required reporting for each single transaction above $10,000, they did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement." Comptroller General, Report to Congress, "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need For Amendment," GGD-81-80, at 23-24 (July 23, 1981).

[6] *See* 52 Fed. Reg. 11436 (April 8, 1987) (amending 31 C.F.R. § 103.22(a)(1) to provide that "[m]ultiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than

There was confusion within the Bank as well. At trial, the evidence established that the tellers who were responsible for filing CTRs in the branch where Mr. McDonough banked did not understand that his structured transactions were reportable.[7] At the same time, the official in the Bank headquarters who understood that the IRS was seeking information even on such structured transactions knew nothing of Mr. McDonough or his transactions at any time during the period charged in the indictment.[8] In short, there was no evidence that anyone in the Bank made a conscious choice not to file the reports at issue — or even made a conscious choice to avoid compliance by intentionally compartmentalizing knowledge of facts and law.

No such choice was required, however, according to the instructions of the district court.[9] Rather, the jury was instructed that a corporation could be convicted of a specific intent crime even if none of its employees ever chose consciously to violate

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$10,000 during any one business day"). The Bank has maintained throughout this case that it violated no law by failing to report Mr. McDonough's structured transactions. Because the ambiguity in the law has now been removed, however, and banks now, for the first time, have clear notice that structured transactions are reportable, the Bank does *not* urge certiorari to review that claim here.

[7] One of the tellers who was indicted along with the Bank testified that she thought McDonough's transactions non-reportable because she believed he never withdrew more than $10,000 from any single account. *See* 1st Cir. App. 1662-65, 1753-58, 2646-62. The other indicted teller testified that she thought reports were required only when an individual check exceeded $10,000, as none of McDonough's did. *See id.* 1832-33, 1838, 1858-61. Both tellers were acquitted of all charges. *See* A4.

[8] *See* 1st Cir. App. 807-13, 2317-18. There was not a shred of evidence that the failure to report the McDonough transactions was part of a larger pattern of non-compliance which might have triggered the attention of headquarters' officials. Quite the contrary, internal audits *and* examinations by the Office of the Comptroller of the Currency had both repeatedly found the Bank fully in compliance with the currency transaction reporting requirements. *See* 1st Cir. App. 865-66, 962-63, 1547-51, 2562-65, 2575-79, 2762-63.

[9] The transcript of the trial court's charge to the jury on the element of "willfulness" is reprinted in full in Appendix D to this Petition.

or disregard the law. Over the objection of the Bank, the trial judge charged that the Bank could be found to have had specific intent to violate the law simply because of "some flagrant organizational indifference," A39, or even because it was "plainly indifferent," A40, based on "the sum of the knowledge of all of the employees," A38.

Nor was the jury limited in the number of felonies for which it could convict the Bank. The trial court ruled, as the indictment charged, that if a "pattern" of such wrongdoing were established, each and every failure to file a report — failures that would otherwise merely be misdemeanors — was converted into a separate felony punishable by a fine of up to $500,000. *See* Appendix E.

The jury acquitted Mr. McDonough and the two bank tellers who had been charged along with the Bank. But it convicted the Bank on all 31 counts submitted to it.

On appeal, the court of appeals affirmed. While recognizing that this is a "specific intent" crime, the court held that corporate "indifference" was enough to meet that standard. *See* A23-A24. And while recognizing that another circuit had taken a different approach, the court approved treatment of each failure to file a report as a separate felony. *See* A17-A19. Each of these holdings calls out for this Court's review.

REASONS FOR GRANTING THE WRIT

This is a case in which a corporation was subject to conviction for its "indifference," not for the conscious wrongs of its employees, and in which a single pattern of such "indifference" was punished as 31 separate felonies. Some might think that these are desirable results. Some might think that policy should be shaped to produce them. Indeed, the Government said as much in its briefs in the court below. But those arguments

should have been addressed to the Congress and the Treasury, not to the federal courts. In affirming the Bank's conviction, the court below assumed a role that the Constitution denies it, and reserves solely to the lawmaking branches. *See McNally* v. *United States*, 107 S. Ct. 2875, 2881 (1987); *United States* v. *Boston & Me. R.R.*, 380 U.S. 157, 160 (1965) (quoting opinion of Marshall, C.J., in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

Such judicial lawmaking increases dramatically the potential criminal liability of all corporations, not just the Bank. It threatens convictions for negligent inaction not only under the currency transaction reporting laws, but also under every federal criminal statute that has until now been limited by standards of specific intent. It raises the potential penalties for such violations by hundreds of millions of dollars. This Court should determine whether such grave changes in corporate criminal liability may be imposed by judicial fiat, rather than by duly enacted law.

I. WHETHER A CORPORATION MAY BE CONVICTED OF A SPECIFIC INTENT CRIME ON THE BASIS OF "ORGANIZATIONAL INDIFFERENCE" IS AN IMPORTANT QUESTION OF FEDERAL LAW.

The first issue calling for this Court's review is whether a corporation may be convicted of a specific intent crime even if none of its employees ever consciously chose to violate the law. There is simply no evidence that Congress ever intended such a result.

Only "willful" violations of the currency transaction reporting laws are criminal. 31 U.S.C. § 5322. Without exception, every court that has construed this willfulness requirement has

concluded that willfulness here means specific intent. That is, "the defendant [must] have *actually known* of the currency reporting requirements and have voluntarily and intentionally violated that known legal duty in order to be convicted of the crime." *United States* v. *Warren*, 612 F.2d 887, 890 (5th Cir.) (en banc), *cert. denied*, 446 U.S. 956 (1980).[10] No court has ever suggested that the standard should be any looser for corporations than for individuals. And indeed, neither the Government nor the court below ever denied that just such specific intent was required here.

The trial court's instructions, however, strayed fatally from this requirement of specific intent. To be sure, the instructions on intent began unobjectionably, stating that "[k]nowingly simply means voluntarily and intentionally," and that "[w]illfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law." A33. And those instructions proceeded unobjectionably, to the extent they told the jury it could impute an employee's knowledge and intent to the bank: "if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment," A38, and "[t]he bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully," A38.

But the instructions went awry in laying out a second, alternative theory: that specific intent could be found even if *no* employee knew the law and chose to violate it, and even if the Bank was guilty of nothing more than indifference to its

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[10] *Accord*, *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 791 (1985); *United States* v. *Sans*, 731 F.2d 1521, 1529 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 791 (1985); *United States* v. *Dichne*, 612 F.2d 632, 636 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *United States* v. *Chen*, 605 F.2d 433, 435-36 (9th Cir. 1979); *United States* v. *Schnaiderman*, 568 F.2d 1208, 1212 (5th Cir. 1978); *United States* v. *Granda*, 565 F.2d 922, 926 (5th Cir. 1978).

obligations. Terming intent a "double business" in this case, the trial court told the jury it could look not only at the knowledge and purposes of the bank's employees, but also at "the bank as an institution." A38, A37. As for knowledge of legal duty, the jury could "sum" up the knowledge of "separate employees" and attribute that sum to the bank, A38; if one employee knew the law and another the facts, the "institution" could thus be deemed to know both, even though no person did. And as for willful violation of that duty, "flagrant organizational indifference" was enough — a threshold that was dropped even lower when, in response to a juror's question, the court stated that the bank could be found guilty if "as an institution [it] was plainly indifferent to its obligations." A39, A40.

The First Circuit affirmed these instructions, holding flatly that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability," A22, and that a "flagrant indifference" instruction is appropriate because "the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as 'a disregard for the governing statute and an indifference to its requirements.'" A23-A24. In support of this holding, the court cited a line of railroad and truck safety cases, beginning with this Court's decision in *United States* v. *Illinois Central Ry. Co.*, 303 U.S. 239 (1938). *See* A24.

The *Illinois Central* line of cases indeed held corporations liable for "willful" violations of various railroad and trucking regulations on the basis of their organizational "indifference" to their duties. But the court below said not a word to explain why Congress's language in the Bank Secrecy Act should be read in light of this line of decisions, all of which openly acknowledge that far less is required to show willfulness in such "public safety" violations than in crimes requiring a showing of specific intent, such as tax evasion.

Illinois Central, for example, was a case involving the 37-hour incarceration of cattle in a box-car. This violated a federal statute that limited such confinement to not more than 28 hours. Although the violation was held "knowing and willful" (and thus subject to civil penalties) despite evidence that it was "due to mere indifference, inadvertence or negligence," 303 U.S. at 244, the Court was careful to point out that more would be required for "offenses [in which] 'willfully' is . . . used to mean with evil purpose, criminal intent or the like," *id.* at 242.[11]

Fiscal offenses, as Congress must have known when it enacted the currency transaction reporting requirements in 1970, are in that latter category. In *United States* v. *Murdock*, 290 U.S. 389, 395 (1933), for example, this Court stated that, as to penal tax offenses, "an evil motive is a constituent element of the crime." In *United States* v. *Bishop*, 412 U.S. 346 (1973), Justice Blackmun wrote for the Court that, "[u]ntil Congress speaks otherwise, we . . . shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock*," *id.* at 361 — a requirement that Justice Blackmun reformulated

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[11] In a handful of later cases, lower federal courts borrowed the civil willfulness standard from *Illinois Central* in criminal cases, likewise equating corporate "indifference" with "willfulness." *See, e.g., Riss & Co., Inc.* v. *United States*, 262 F.2d 245 (8th Cir. 1958) (maximum driving time by truck drivers); *United States* v. *Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972) (falsification of truck drivers' logs); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974) (truck driving while sick). But they did so solely in contexts of minor misdemeanors where no specific intent was required, and, as the Court did in *Illinois Central*, they again expressly distinguished cases that did involve specific intent.

Similarly, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), where this Court held "reckless disregard" enough to show "willfulness" for purposes of punitive civil damages under the Age Discrimination in Employment Act, it did so only in a context where "evil motive or bad purpose" was *not* required, and the employer need *not* have "intended to violate the Act." *Id.* at 126-27 & n.19. *Thurston* was thus firmly placed on the same track as the *Illinois Central* line of cases, and has no bearing on crimes Congress intended to require specific intent.

as "a voluntary, intentional violation of a known legal duty," *id.* at 360. And in *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), this Court reiterated that tax crimes require a showing of "'a voluntary, intentional violation of a known legal duty,'" *id.* at 12 (quoting *Bishop*), even while holding the words "bad purpose or evil motive" unnecessary to a proper instruction on specific intent.

That Congress had every reason to treat the currency transaction reporting laws as falling into this "specific intent" category is confirmed by the fact that *every* lower court construing those laws has held them analogous to the laws criminalizing tax evasion — *not* to laws limiting the hours that truck drivers may drive or farm animals may be caged. As the lower courts have uniformly held, currency transaction reporting violations "require proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime." *United States* v. *Granda*, 565 F.2d 922, 926 (5th Cir. 1978). *See* pp. 7-8 & n.10 *supra*.

To apply the "plain indifference" standard developed for "willful" violations of railroad and trucking safety regulations to a case where Congress must be deemed to have required proof of specific intent is to expand the bounds of corporate liability far beyond the limits that Congress chose to set. The significance of this case is not limited to the Bank of New England, or even to the Bank Secrecy Act, but extends to all corporations, and to all criminal laws that Congress intended to limit to cases of specific intent. For under the standards applied by the courts below, it is difficult to conceive of *any* failure by a bank or corporation to file required forms, pay taxes, or otherwise fulfill its legal duties that could *not* be deemed "willful." Virtually every such omission could presumably be traced to some lack of communication or the sort of "indifference" that was enough for multiple felony convictions here. And virtually every such omission could therefore be

subject to multi-million dollar fines. Congress is free to impose such strict liability upon banks and corporations — if and when it chooses to do so. But under our constitutional principles of separated powers and due process, courts are not similarly free.

II. WHETHER A "PATTERN" OF CURRENCY TRANSACTION REPORTING VIOLATIONS GIVES RISE TO A SINGLE FELONY, OR INSTEAD TO A SEPARATE FELONY FOR EVERY VIOLATION THAT IS PART OF THE PATTERN, IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS DIVIDED THE CIRCUITS.

Even if the Bank had been properly charged and convicted for violating the Bank Secrecy Act, the question remains how *many* felony violations a court can properly read into Congress' words. Three circuit courts of appeals have now confronted the language of the felony enhancement provision of the Bank Secrecy Act, and have approved substantially different interpretations of what Congress meant. The result is that the same acts, done in different circuits, expose a financial institution to vastly different potential fines, and individuals to vastly different maximum prison terms.

At the time of the transactions at issue in this case, the Bank Secrecy Act provided that a single willful failure to file a required CTR was a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for up to one year. Felony liability was provided for a "pattern" of such violations:

> A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall

> be fined not more than $500,000, imprisoned for not more than 5 years, or both.

31 U.S.C. § 5322 (a), (b).[12]

These words leave wholly unclear whether each pattern constitutes a single felony, as the Bank has argued, or whether each violation which is part of a pattern may constitute a separate felony, as the court below held, or whether the number of felonies should be reckoned by each 12-month period or by each $100,000 worth of violations. Different prosecutors, and different lower courts, have adopted different conclusions. Under our system of government, Congress cannot have intended any such latitude.

The first court of appeals to confront the problem was the Ninth Circuit. In *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979), that court upheld the Government's authority to charge four felonies based on 377 misdemeanor violations involving $11 million over a four year period.[13] Applying here the *Beusch* methodology, in which one felony was charged for each twelve-month period, two felonies could be charged. In *United States* v. *Kattan-Kassin*, 696 F.2d 893, 896 (11th Cir. 1983), the Eleventh Circuit concluded that it was proper to charge 11 felony counts involving some $7 million of transactions, since 11 transactions constituted the pattern. In doing

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[12] While these provisions have since been amended to increase the penalties, the structural questions at issue here, and the language upon which they are based, remain unchanged.

[13] *Beusch* was governed by the predecessor felony provision, identical for all relevant purposes, then codified as 31 U.S.C. § 1059(2). The felony provisions in both versions treat foreign transaction reporting violations, such as that in *Beusch*, the same as domestic reporting violations.

Judge Bright, dissenting in *Beusch*, would not have allowed the Government to charge *any* felonies where all that was involved were a series of misdemeanor violations; "[s]uch a criminal statute of uncertain scope calls for strict construction and leniency in application." 596 F.2d at 881.

so, however, the Eleventh Circuit acknowledged that under its interpretation, shared by the First Circuit here, there simply could *never* be a single felony. More recently, the Ninth Circuit approved yet another approach in *United States* v. *So*, 755 F.2d 1350, 1355 (9th Cir. 1985), where it found that each failure could be charged as a separate felony but only *after* the $100,000 threshold had been reached in a twelve month period. Applying the *So* methodology here would reduce the number of felonies by ten — fully one-third.

The fact of such a conflict — and the uncertainty and unfairness that conflict creates — serves as a compelling argument for this Court's review. Moreover, even a cursory review of the legislative history suggests that not only does the view of the First Circuit conflict with that of the Ninth; it also appears to conflict with that of the Congress.

The only justification offered by the First Circuit in this case for choosing the approach it did was that "Congress intended that the section be used to punish violators severely"; counting each failure as a separate felony maximized the number of crimes and thus assured such "severe punishment." *See* A20-21. But the First Circuit's approach in fact conflicts with the apparent intent of Congress.

In Congress' view, the "serious violations" to be punished as felonies were those which "involve very large sums of money" — those in which "fines of as much as $10,000 or more might be shrugged off as a mere cost of doing business." H.R. Rep. No. 975, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4394, 4406. Under the approach adopted by the court below, however, liability turns on the number of trips to the Bank, not the amount of money involved. One million dollars withdrawn in two trips amounts to two felonies; $101,000 withdrawn in ten trips amounts to ten felonies — or five times as much punishment for one-tenth as much money. The examples are not simply hypotheticals: *Kattan-*

Kassin involved ten times the amount of money — but only a third the number of felonies — as did this case.

Nor is there any evidence supporting the inherently implausible view that Congress, in passing the felony enhancement provision, intended that there could never be a single felony, and that the penalty limits it deliberately set instead be only half-way points. Yet since it is undisputed in the case law that a "pattern" must necessarily consist of at least two violations, *United States* v. *Dickinson*, 706 F.2d 88, 91-92 (2d Cir. 1983), that is the inevitable result of the approach approved by the Eleventh Circuit in *Kattan-Kassin* and the First Circuit here.

The Bank has consistently argued that principles of both plain meaning and lenity compel the adoption of the most natural reading of the felony provision: that "[a] person willfully violating" the reporting regulations may be subjected to a felony fine of half a million dollars only once for each "pattern" of which those violations are "part." But even if that natural reading is rejected, and the apparent intent of Congress ignored, the best that can be said of the approach adopted below is that it is one of a number of plausible judicial guesses as to the construction of the penalty provision — certainly no more plausible than the Bank's reading, or the different approaches of the Ninth Circuit in *Beusch* and *So*.

Remarkably, the court below conceded as much, admitting that "[b]oth the Ninth Circuit and the Eleventh Circuit have advanced plausible constructions of the Act's felony provisions." A18-A19. But the court here sought to justify its entry into this guessing game by asserting that the verdict was still within the maximum fine that could have been imposed even under the approach of the Ninth Circuit. *See* A18.

That assertion was wrong as a matter of fact, for under the approach of the Ninth Circuit in *Beusch* as opposed to *So*, there could have been charged no more than two felonies here, for a maximum total fine of $1 million — less than the $1.24

million fine in fact imposed. Moreover, as a matter of law, that assertion was hardly enough to uphold this judgment: the sentence (of $40,000 *per* count) might well have been lower, and the jury less prone to convict, had fewer counts been charged. But most important, the court's express concession belies any claim to reasonable certainty in its construction of this statute.

It is the very fact of such guesswork that triggers due process and separation of powers concerns deserving of the attention of this Court. It has long been established that the legislative branch alone must set the terms of punishment and that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). This is as true for the "unit of prosecution" as for the definition of the elements of the offense. *See United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) ("When Congress has the will it has no difficulty in expressing it — when it has the will, that is, of defining what it desires to make the unit of prosecution . . . ."). "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958).

Only this Court's review can end the game of speculation engaged in by the First, Ninth and Eleventh Circuits. Even more critical, only this Court's review will assure not only the Bank of New England, but every institution subject to this and other similarly ambiguous statutes, the process that the Constitution says is due — process of law, not of judicial hunch.

CONCLUSION

For the foregoing reasons, petitioner Bank of New England respectfully urges this Court to review and reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 86-1334

UNITED STATES OF AMERICA,
Plaintiff, Appellee,
v.
BANK OF NEW ENGLAND, N.A.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Bownes and Selya, *Circuit Judges*,
and Pettine,* *Senior District Judge*.

Laurence H. Tribe with whom *Susan Estrich, Kathleen M. Sullivan, Mark A. Michelson, Amos Hugh Scott*, and *Choate, Hall & Stewart* were on brief for appellant.

Sara Criscitelli, Attorney, Department of Justice, with whom *Robert S. Mueller, III*, United States Attorney for the District of Massachusetts, and *John J.E. Markham, II*, Assistant United States Attorney for the District of Massachusetts, were on brief for appellee.

June 10, 1987

* Of the District of Rhode Island, sitting by designation.

BOWNES, *Circuit Judge*. The Bank of New England appeals a jury verdict convicting it of thirty-one violations of the Currency Transaction Reporting Act (the Act).[1] 31 U.S.C. §§ 5311-22 (1982).[2] Department of Treasury regulations promulgated under the Act require banks to file Currency Transaction Reports (CTRs) within fifteen days of customer currency transactions exceeding $10,000. 31 C.F.R. § 103.22 (1986).[3]

---

[1] The Act is also referred to as the Bank Secrecy Act.

[2] The Act provides in relevant part:

> **§ 5313. Reports on domestic coins and currency transactions**
>
> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.
>
> **§ 5322. Criminal penalties**
>
> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000 imprisoned for not more than one year, or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined no more than $500,000, imprisoned for not more than 5 years or both.

[3] The regulations then in effect provided:

> **§ 103.22 Reports of currency transactions**
>
> (a) (1) Each financial institution, other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

The Act imposes felony liability when a bank willfully fails to file such reports "as part of a pattern of illegal activity involving transactions of more than $100,000 in a twelve-month period . . . ." 31 U.S.C. § 5322(b).

I. THE ISSUES

The Bank was found guilty of having failed to file CTRs on cash withdrawals made by James McDonough. It is undisputed that on thirty-one separate occasions between May 1983 and July 1984, McDonough withdrew from the Prudential Branch of the Bank more than $10,000 in cash by using multiple checks — each one individually under $10,000 — presented simultaneously to a single bank teller. The Bank contends that such conduct did not trigger the Act's reporting requirements. It also urges that felony liability should not have been imposed because it did not engage in a pattern of illegal activity. In addition, the Bank avers that, if it did commit a felony violation, it did not commit thirty-one of them. The Bank also argues that the trial judge's instructions on willfulness were fatally flawed, and that, in any event, the evidence did not suffice to show that it willfully failed to file CTRs on McDonough's transactions. Finally, the Bank submits that during her charge to the jury, the trial judge erroneously alluded to evidence of the Bank's conduct after the dates specified in the indictment.

The Bank had been named in a federal grand jury indictment which was returned on October 15, 1985. Count One of the indictment alleged that between May 1983 and May 1985, James McDonough, the Bank, and Carol Orlandella and Patricia Murphy — both of whom were former head tellers with the Bank's Prudential Branch — unlawfully conspired to conceal from the IRS thirty-six of McDonough's currency trans-

actions. The trial court directed a verdict of acquittal on this count. Defendants Murphy and Orlandella were found not guilty of charges that they individually aided and abetted the failure to file CTRs on McDonough's transactions.

The bulk of the indictment alleged that the Bank, as principal, and McDonough, as an aider and abetter, willfully failed to file CTRs on thirty-six occasions between May 1983 and July 1984. Five counts were dismissed because, on those occasions, McDonough received cashier's checks from the Bank, rather than currency. McDonough was acquitted of all charges against him. The Bank was found guilty on the thirty-one remaining counts. We affirm.

II. THE REPORTABILITY OF McDONOUGH'S TRANSACTIONS

The evidence at trial revealed that from 1978 through September 1984, McDonough was a regular customer at the Prudential Branch of the Bank of New England. McDonough visited that branch several times a month to withdraw large sums of cash from various corporate accounts. On thirty-one occasions from May 1983 through July 1984, McDonough requested a number of counter checks — blank checks which a teller encodes with the customer's account number — which he would then make payable to cash for sums varying between $5,000 and $9,000. On each of the charged occasions, McDonough simultaneously presented to a teller between two and four counter checks, none of which individually amounted to $10,000, Each check was recorded separately as an "item" on the Bank's settlement sheets. Once the checks were processed, McDonough would receive in a single transfer from the teller, one lump sum of cash which always amounted to over $10,000. On each of the charged occasions, the cash was

withdrawn from one account. The Bank did not file CTRs on any of these transactions until May 1985, shortly after it received a grand jury subpoena.

The Bank contends that its conviction must be overturned because it did not engage in conduct that can be construed as violative of the Currency Transaction Reporting Act. It argues that the Act and its implementing regulations do not provide fair warning that a violation occurs of a financial institution fails to report a cash withdrawal in excess of $10,000 effected by a customer's use of multiple checks, each of which is less than $10,000. The Bank submits that since that Act fails to give sufficient notice that such conduct triggers the reporting requirements, its conviction violates fundamental norms of due process. It points out that the Constitution forbids the conviction of a defendant for conduct not clearly proscribed by penal statutes. *United States* v. *Bass*, 404 U.S. 336, 348 (1971); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Anzalone*, 776 F.2d 676 (1st Cir. 1985). The Bank asserts that to convict it for conduct not expressly prohibited by the Currency Transaction Reporting Act offends the basic constitutional canon that "the power of punishment is vested in the legislative, not in the judicial[,] department." *United States* v. *Boston & Me. R.R.*, 380 U.S. 157, 160 (1965) (quoting *United States* v. *Wiltberger*, 5 Wheat. 76 (1820).

The Currency Transaction Reporting Act instructs the Treasury Department to promulgate regulations specifying the circumstances and currency amounts which trigger the Act's reporting requirements. 31 U.S.C. § 5313 (1982). The Treasury regulations, promulgated in 1972, provide: "Each financial institution . . . shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer . . . to such financial institution, which involves a transaction in currency of more than $10,000." 31 C.F.R. § 103.22 (1986). The question is whether the due process requirement of fair warning

forbids us from reading this regulation as imposing a duty on banks to file reports on customers who withdraw more than $10,000 in cash at one time by using two to four checks instead of only one check.

The Treasury regulations define "transaction in currency" to mean a "transaction involving the physical transfer of currency from one person to another." 31 C.F.R. § 103.11 (1986). In the instant case, McDonough's practice was to visit the same branch of the same bank on only one occasion in a single day. He simultaneously would present to a single bank teller two to four checks, all made payable to cash, for varying amounts under $10,000 which, when added together, equalled a sum greater than $10,000. In return, the same bank teller would transfer to him in a single motion a wad of cash totalling more than $10,000.

We have no trouble categorizing such conduct as a single physical transfer of currency in excess of $10,000 from the Bank to McDonough. We, therefore, conclude that the language of the regulations itself gave the Bank fair warning that McDonough's transaction were reportable. This case does not, as the Bank suggests, involve a bank customer engaging in multiple currency transactions. McDonough engaged in thirty-one separate transactions, each exceeding $10,000, which were effected by the use of multiple checks. The use of multiple checks during a single transfer of currency is not the same as multiple currency transactions. Thus, the Bank's citation of comments from agency officials, such as the IRS Assistant Commissioner for Criminal Investigation, about the reportability of multiple transactions is irrelevant. These comments have no bearing on the resolution of this case but, instead, are addressed to situations in which a customer obtains over $10,000

via more than one physical transfer of currency.[4] *E.g.*, *United States* v. *Reinis*, 794 F.2d 506 (9th Cir. 1986) (cash withdrawal exceeding $10,000 effected by defendant's and his agents' purchase of several cashier's checks from the same bank in a single day but at different times, held not reportable since there was no single transfer of currency exceeding $10,000 to either defendant personally or any one of his agents); *United States* v. *Dela Espierella*, 781 F 1432 (9th Cir. 1986) (defendant who obtained more than $100,000 currency a day by sending several agents to 19 different bank locations to purchase cashier's checks for less than $10,000 each did not engage in a reportable transaction); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) (no CTRs required to be filed on defendant who obtained $50,000 in three days by purchasing six cashier's checks, each under $10,000, from six different banks); *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986) (CTR need not be filed on defendant who purchased 14 checks for approximately $9,900 each from 14 different financial institutions); *United States* v. *Cogswell*, 637 F. Supp. 295 (N.D. Cal. 1985) (no CTR required to be filed on defendant who purchased three different cashier's checks each slightly less than $10,000 at three different banks in a single day).

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[4] For example, the Bank cites the following statement from the Comptroller General:

> The regulations were silent on the propriety of a customer's conducting multiple transactions to avoid reporting . . . .
>
> . . . .
>
> . . . . Similarly, although the regulations required reporting for each single transaction above $10,000, they did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement.

Comptroller General, Report to Congress, *Bank Secrecy Reporting Requirements Have Not Yet Met Expectations, Suggesting Need for Amendment*, GGD-81-80, at 23-24 (1981)

Indeed, the IRS Assistant Commissioner for Criminal Investigation specifically discussed *Varbel, Denemark,* and *Cogswell* immediately after stating that the Treasury regulations do not require "that multiple currency transactions on the same day (each less that $10,000) that aggregate more than $10,000, be reported by a financial institution." *Tax Evasion, Drug Trafficking and Money Laundering as They Involve Financial Institutions: Hearings Before The Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs,* 99th Cong., 2d Sess. 181 (1986).

The instant case does not involve a defendant employing several agents to purchase a number of checks, each under $10,000, from the same bank in a single day. Nor does it involve a single defendant visiting different banks on the same day; or different branches of the same bank on the same or different days; or even different visits to the same branch of the same bank on the same day. The fact that such practices may be regarded as multiple transactions, and their reportability under the act may be uncertain, is of no moment here. It is undisputed that each of the violations charged in the indictment involved a single, lump-sum transfer of more than $10,000 to McDonough from the Bank's Prudential Branch. McDonough's method of withdrawing more than $10,000 in cash can be regarded as multiple transactions only by disregarding the fact that he would make but one visit in a day to the same branch of the same bank where he would simultaneously present more than one check to one teller who would hand him in one motion a single sum of cash exceeding $10,000. McDonough could be said to have engaged in multiple transactions only by reading the regulations as attaching paramount importance to the number of checks presented by a customer. The regulations, however, impart primary significance to the amount of currency transferred, defining transaction as "the physical transfer

of currency from one person to another." 31 C.F.R. § 103.11. On every occasion for which it was found guilty, the Bank transferred more than $10,000 to McDonough in a single act.

This case falls squarely within the Act's reporting requirements because it involves the physical transfer of more than $10,000 in currency from one bank in one day to a single customer during a single visit. A survey of the case law indicates that when a customer uses several checks, each of which is less than $10,000, in order to withdraw more than $10,000 from the same bank on the same day, he has engaged in a reportable transaction. *See United States* v. *Cure*, 804 F.2d 625, 629 (11th Cir. 1986) ("purchase of multiple cashier's checks in an aggregate amount of more than $10,000 from different branches of the same bank on the same day constitutes a single transaction in excess of $10,000"); *United States* v. *Heyman*, 794 F.2d 788, 792 (2d Cir.) (financial institution must report a customer deposit exceeding $10,000 which had been divided into small sums and in a single day deposited into different accounts held by the same customer in the same financial institution), *cert. denied*, 107 S. Ct. 585 (1986); *United States* v. *Giancola*, 783 F.2d 1549 (11th Cir.) (bank must file CTRs on defendants who purchased over $10,000 in cashier's checks in a single day by structuring transactions in amounts of less than $10,000 at different branches of the same bank), *cert. denied*, 107 S. Ct. 669 (1986); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant's conduct, whereby on ten occasions he entered bank and each time simultaneously purchased two cashier's checks for $9,000, "clearly came within the ambit of the financial institution reporting requirements"); *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979) (bank employee who divided $45,000 loan into five $9,000 notes and then simultaneously handed five bundles of $9,000 cash to borrower, properly convicted of failing to file a CTR on a $45,000 transaction).

As some of the cases cited hold, the reporting requirements may attach, even if a customer obtains $10,000 or more by visiting different branches of the same bank at various times in a single day. This is not the situation here; McDonough always obtained more than $10,000 cash by making one visit on a given day to the same branch of the same bank. We need not decide whether the current regulations can be read to impose a reporting obligation when a customer receives more than $10,000 currency by making numerous visits on the same day to different branches of the same bank. The Treasury Department, at the urging of other branches of government, recently has amended the current regulations so that they expressly obligate financial institutions to treat as a single reportable transaction, multiple currency transactions by a customer which total more than $10,000 in a single day.[5] This amendment is irrelevant to the matter before us, since McDonough did not engage in multiple currency transactions.

The Bank relies heavily on our decision in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985). In that case, we overturned a bank customer's conviction for violations of the Act. The defendant in *Anzalone* had purchased three checks on November 13, 1980, from the Haymarket Cooperative Bank. Each of the checks was less than $10,000, but in the

---

[5] The amendment reads as follows:

> **§ 103.22 Reports of currency of transactions.**
>
> (a) (1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment, or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day . . . .

52 Fed. Reg. 11436 (April 8, 1987).

aggregate they amounted to $25,000. Thereafter, the defendant purchased nine different checks on nine separate days, totalling $75,000. None of the checks individually, however, exceeded $10,000. We held that nothing in either the Act or its regulations obligated a bank *customer* to report cash withdrawals of $10,000 or more. 766 F.2d at 681-82. Anzalone also had been convicted of willfully aiding and abetting the Haymarket Bank's failure to file a CTR. We reversed that conviction, holding that "[t]he Bank, under the circumstances of this case, did not commit any crime by failing to report transactions as it lacked knowledge of their 'structured' nature." 766 F.2d at 683.

Anzalone held that the Treasury Regulations then in effect imposed no duty on a customer to inform a financial institution that he or she is structuring to avoid the Act's reporting requirements. The case also held that the Haymarket Bank did not have to report transactions that it did not know were being structured to avoid the Act's reporting requirements. Judge Aldrich concurred with this holding, but wrote separately to emphasize his view that the bank did have a duty to report the November 13, 1980, withdrawal in which Anzalone acquired three $8,500 checks from three separate tellers at two different branches of the Haymarket Bank. The government, however, chose to lump Anzalone's conduct on November 13 with his actions on the nine separate days thereafter, when he purchased nine different checks, totalling $75,000, each of which was slightly less than $10,000. Thus, the government's presentation of the case rendered it unnecessary for the court to decide whether Anzalone's November 12 transaction was reportable. Judge Aldrich, therefore, had no reason to diverge from the court's main holding. 766 F.2d at 683-84.

Anzalone involved the reportability of two kinds of transactions. First, it held that the Act does not require a bank to report multiple transactions undertaken on different days which aggregate to more than $10,000, *if* the bank does not know

the transactions are being structured to avoid the Act's reporting requirements. 766 F.2d at 683. Second, *Anzalone*, did *not* decide whether a customer engages in a reportable transaction when he obtains more than $10,000 by receiving a total of three transfers of currency from two branches of the same bank in a single day. *Anzalone* thus does not foreclose a holding that both these kind of transactions are reportable. But more importantly, the facts of the instant case are wholly distinguishable from either of these two situations. *Anzalone*, therefore, has no direct bearing on the issues before us.

On thirty-one occasions, James McDonough visited the same branch of the same bank at one time in a single day. He presented between two and four checks totalling more than $10,000 to one bank teller and received from the teller a single sum of cash in excess of $10,000. Since the regulations define transactions in currency to mean "the physicial transfer of currency from one person to another," we hold that the Bank had adequate warning that a single, lump-sum transfer of cash excceeding $10,000 was reportable, regardless of the number of checks the customer uses to obtain the money.

III. THE IMPOSITION OF FELONY LIABILITY ON THE BANK

A. *The "Pattern" Instruction*

31 U.S.C. § 5322(b) provides in pertinent part:

> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), . . . as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period shall be fined . . . .

The Bank claims that the jury was erroneously instructed on the definition of "a pattern of illegal activity" and that, therefore, a new trial is necessary. Before we examine the pattern instruction, we note that the Bank did not, despite the provisions of Federal Rule of Criminal Procedure 30, object to the instructed definition. This means that the instruction must stand unless it constituted plai rror. *United States* v. *Krowen*, 809 F.2d 144, 150 (1st Cir. 1987); *United States* v. *Kakley*, 741 F.2d 1, 3 (1st Cir.), *cert. denied*, 469 U.S. 887 (1984). Nor did the Bank submit a suggested definition of pattern in its requests for instructions.

The district court's instruction was:

> Pattern simply means repeated transactions. One transaction is not a pattern; two may not be either, but it you get a series of transactions, that may then be a pattern. And in this context, what we're talking about is a pattern of repeated failures to file required reports on these transactions.
>
> The Government must prove that the transactions involved more than $100,000 in a 12-month period. No one transaction has to be greater than $100,000, so long as the total of the transactions is in any 12-month period. It's a shifting period, so you can look at any period that you want. And if within that period, transactions of more than $100,000 occurred and there was a willful failure to file with respect to them, then this fourth element has been satisfied.
>
> So, if you find that a series of transactions occurred that required the filing of reports and that the total of such transactions in any 12-month period involved more than $100,000, this element is satisfied, even if no one transaction itself exceeded 100,000 dollars. It is kind of a fillip on the multiple business. So, if

> you find that a reportable transaction occurred, that no report was filed, that transaction may be considered as part of the pattern if others occurred and if in any 12-month period the total was more than $100,000.

The Bank attacks the instruction on two grounds: that the definition of pattern is impermissibly broad; and the court failed to distinguish between a pattern of conduct by the defendant McDonough and a pattern of activity by the Bank. We reject both contentions.

There are three cases construing "a pattern of illegal activity" under the Act. In *United States* v. *Dickinson*, 706 F.2d 88 (2d Cir. 1983), the court appeared to adopt the following definition: "the pattern of illegal activity *must involve repeated violations* of the Act itself, related to each other and together involving more than $100,000." *Id.* at 91 (emphasis added). The court stated later: "The requirement that the violations be part of a pattern merely excludes cases where the violations are isolated events and not part of a common or systematic scheme." *Id.* at 92.

The Ninth Circuit in *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979), discussed the meaning of pattern under 31 U.S.C. § 1059, the predecessor statute of § 5322(b):

> First, the plain language of subsection (2) of § 1059 indicates to us that a series of currency transfers which, by themselves, constitute only misdemeanors, may also constitute felonious activity if they (a) show a pattern of illegal activity, and (b) exceed $100,000 over a 12-month period. In contrast to subsection (1) of § 1059, which requires other illegal activity (i.e., activity not involving violations of the Bank Secrecy Act), subsection (2) evidences

> no similar requirements. *We infer therefore, that a series of misdemeanor violations of the act may, by themselves, call forth the increased penalties of subsection (2).*

Id. at 878 (emphasis added).

The most recent case we could find on the subject is *United States* v. *Valdes-Guerra*, 758 F.2d 1411 (11th Cir. 1985). The court stated:

> While there is little caselaw construing the phrase "pattern of illegal activity," both circuits which have directly confronted the issue had held that *a series of currency reporting violations* which, by themselves, constitute only misdemeanors may also be felonious if they show a pattern of illegal activity and exceed $100,000.00 over a twelve-month period. *United States* v. *Dickinson*, 706 F.2d 88, 91-93 (2d Cir. 1983); *United States* v. *Beusch*, 596 F.2d 871, 878-79 (9th Cir. 1979). We agree with those courts that the legislative history of section 5322(b) evinces an intent not only to deal seriously with reporting violations undertaken in conjunction with violations of other federal laws, *but also to punish as a felony violations undertaken in a repeated manner which "involve very large sums of money."* H.R. Rep. No. 91-975, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Ad. News 4394, 4406. Congress intended that "serious violations *under this title*" could not "be shrugged off as a mere cost of doing business." *Id.* (emphasis added); *Dickinson*, 706 F.2d at 92.

Id. at 1414 (emphasis added).

The common theme running though these three cases is that a pattern consists of repeated violations or a series of violations. The court's instructions clearly embodied this. While the instruction might have been more accurate if it defined pattern as repeated *and* related violations of the Act, the omission of the word related does not even come close to plain error. Under the evidence adduced, it was clear that the repeated failures by the Bank to report were directly related to the withdrawals by McDonough. These failures were not isolated events; they entailed repeated failures to file CTRs on similar transactions by the same customer. The similarity of the transactions, coupled with the frequency and regularity of their repetition, establish a related scheme.

The contention that the instruction did not distinguish between a pattern by McDonough and another by the Bank is technically correct, but it ignores the rest of the charge in which the court repeatedly informed the jury that each defendant must be judged separately. The court also pointed out that it was the Bank that had the duty to report the transactions. To argue that the Bank must be divorced from McDonough is to ignore reality; McDonough made the withdrawals. The question for the jury was whether the Bank knowingly and willfully broke the law by failing to report them.

We have a final comment. When a defendant fails to specifically request an instruction on "a crucial and potentially complex issue of fact for a jury," Appellant's Brief at 24, and then fails to object to the instruction given, one of two conclusions can be drawn: that the defendant deliberatley left the matter to the discretion of the trial judge; or it decided to play the waiting game in the hope of getting an appealable error without committing itself. Since we uphold the jury instruction, no more need be said.

B. *Conviction of Thirty-One Felonies*

This issue, which is an extension of the previous one, also involves the construction of 31 U.S.C. § 5322(b). At the time of indictment, the penalty for a violation of § 5322(b) was a fine of $500,00 and/or imprisonment for not more than five years. Section 5322(a) made a violation a misdemeanor with a fine of not more than $1,000 and/or imprisonment for not more than one year.[6] The question is whether each of the thirty-one violations that was "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period" may be separately prosecuted as a felony or whether a pattern of violations within a 12-month period constitutes only a single felony offense. The district court ruled that, if a pattern of illegal activity was proven, each violation constituted a felony. The Bank duly objected to this construction of the statute.

Although the Bank argues that the ruling rewrote the statute in defiance of precedent, we find that the district court's ruling comports with the plain language of the statute and its legislative history and has solid precedential support. The statute makes it a crime for a person to violate the subchapter "*as part* of a pattern of illegal activity." The words "as part" can only refer to a single violation. In order for subsection (b) to apply, there must be "a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period." A pattern, by any definition, must consist of more than one failure to report. It is not the pattern that is proscribed, but the willful violation that is a part of the pattern. As the court noted in *United States* v. *Katten-Kassin*, 696 F.2d 893 (11th Cir. 1983),

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[6] 31 U.S.C. § 5322(b) has since been amended to increase the maximum prison term to ten years. Section 5322(a) has been amended to provide for a fine of not more than $250,000 and/or imprisonment for not more than five years, thus making any violation a felony.

an absurd result can occur if the felony is limited to the pattern of violations: "after committing two violations involving more than $100,000, a violator would be immune from prosecution [under § 5322(b)] for the remainder of the twelve-month period, subject only to minor misdemeanor penalties." *Id.* at 896.

There can be no doubt that the legislative history of section 5322(b) and its predecessor, 31 U.S.C. § 1059, shows that Congress intended that the section be used to punish violators severely. *See United States* v. *Valdes-Guerra,* 758 F.2d at 1414; *United States* v. *So,* 755 F.2d 1350, 1355 (9th Cir. 1985); *United States* v. *Dickinson,* 706 F.2d at 92; *United States* v. *Kattan-Kassin,* 696 F.2d at 897; *United States* v. *Beusch,* 596 F.2d at 879. Severe punishment can best be assured by treating as a separate felony each violation that is "part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period." 31 U.S.C. § 5322(b).

Although both the Ninth and Eleventh Circuits concur that Congress intended to punish severely those who repeatedly violate the Act's reporting requirements, they differ as to how best to implement that legislative intent. The Ninth Circuit does not regard any transaction as felonious *until* the $100,000 threshold has been reached, *United States* v. *So,* 755 F.2d at 1355; thereafter, every transaction is treated as a felony. The Eleventh Circuit, as we have already noted, treats every transaction as felonious *if* the $100,000 threshold is reached within a twelve-month period. Thus, under the Ninth Circuit's approach, there would be twenty-one felonies; under the Eleventh Circuit's approach, there would be thirty-one felonies. No matter which approach we adopt, the verdict stands since the fine levied against the Bank was far below that which could have been imposed under either approach. Both the Ninth Circuit and the Eleventh Circuit have advanced plausible con-

structions of the Act's felony provision. Because we are convinced that Congress wished to impose the severest possible penalty on repeated violators of the Act, we adopt the approach taken by the Eleventh Circuit in *Kattan-Kassin*: if a pattern of illegal activity involving transactions exceeding $100,000 is proven, each violation is a felony. We, therefore, affirm the district court's ruling and find no error in the jury instruction on this issue.

IV. WILLFULNESS OF THE BANK'S CONDUCT

A. *The Trial Court's Instruction on Willfulness*

Criminal liability under 31 U.S.C. § 5322 only attaches when a financial institution "willfully" violates the CTR filing requirement. A finding of willfulness under the Reporting Act must be supported by "proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime." *United States* v. *Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986); *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984). Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts. *United States* v. *Wells*, 766 F.2d 12, 20 (1st Cir. 1985).

The Bank contends that the trial court's instructions on knowledge and specific intent effectively relieved the government of its responsibility to prove that the Bank acted willfully. The trial judge began her instructions on this element by outlining generally the concepts of knowledge and willfulness:

> Knowingly simply means voluntarily and intentionally. It's designed to exclude a failure that is done by mistake or accident, or for some other innocent reason. Willfully means voluntarily, intentionally,

> and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.

The trial judge properly instructed the jury that it could infer knowledge if a defendant consciously avoided learning about the reporting requirements. The court then focused on the kind of proof that would establish the Bank's knowledge of its filing obligations. The judge instructed that the knowledge of individual employees acting within the scope of their employment is imputed to the Bank. She told the jury that "if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, ..."

The trial judge then focused on the issue of "collective knowledge":

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his emplolyment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemded to know it if each of several employees knew a part of that requirement and the sum of what the separate employees know amounted to knowledge that such a requirement existed.

After discussing the two modes of establishing knowledge — via either knowledge of one of its individual employees or the aggregate knowledge of all its employees — the trial judge turned to the issue of specific intent:

> There is a similar double business with respect to the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file.
>
> . . . .
>
> Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing CTR requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies.
>
> . . . .
>
> If you find that the Government has proven with respect to any transaction either that an employee

> within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

The Bank contends that the trial court's instructions regarding knowledge were defective because they eliminated the requirement that it be proven that the Bank violated a known legal duty. It avers that the knowledge instruction invited the jury to convict the Bank for negligently maintaining a poor communications network that prevented the consolidation of the information held by its various employees. The Bank argues that it is error to find that corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half.

A collective knowledge instruction is entirely appropriate is the context of corporate criminal liability. *Riss & Company* v. *United States*, 262 F.2d 245, 250 (8th Cir. 1958); *Inland Freight Lines* v. *United States*, 191 F.2d 313, 315 (10th Cir. 1951); *Camacho* v. *Bowling*, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-39 (W.D. W.Va. 1974); *United States* v. *Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972). The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. *See, e.g., United States* v. *Cincotta*, 689 F.2d 238, 241, 242 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982); *United States* v. *Richmond*, 700 F.2d 1183, 1195 n.7 (11th Cir. 1983). Similarly, the knowledge obtained by corporate employees acting within the scope of their employment

is imputed to the corporation. *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719, 722 (5th Cir. 1964). Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:

> [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

United States v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 738. Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Nor do we find any defects in the trial court's instructions on specific intent. The court told the jury that the concept of willfulness entails a voluntary, intentional, and bad purpose to disobey the law. Her instructions on this element, when viewed as a whole, directed the jury not to convict for accidental, mistaken or inadvertent acts or omissions. It is urged that the court erroneously charged that willfulness could be found via flagrant indifference by the Bank toward its reporting obligations. With respect to federal regulatory statutes, the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as "a disregard for the governing statute

and an indifference to its requirements." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 127 & n.20 (1985); *United States* v. *Illinois Central R. Co.*, 303 U.S. 239 (1938); *accord Stein Distributing Company* v. *Dept. of Treasury Bureau of Alcohol, Tobacco & Firearms*, 779 F.2d 1407, 1413 (9th Cir.), *cert. denied*, 106 S. Ct. 1963 (1986); *United States* v. *Dye Construction*, 510 F.2d 78, 82 (10th Cir. 1975); *F.X. Messina Construction Corp.* v. *Occupational Safety and Health Review Commission*, 505 F.2d 701, 702 (1st Cir. 1974); *United States* v. *Tarver*, 642 F. Supp. 1109 (D. Wyo. 1986); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740-41. Accordingly, we find no error in the court's instructions on willfulness.

B. *Evidence of Willfulness*

The Bank asserts that the evidence did not suffice to show that it had willfully failed to comply with the Act's reporting requirements. We review the evidence in the light most favorable to the government. *United States* v. *Medina*, 761 F.2d 12, 16 n.3 (1st Cir. 1985); *United States* v. *Tierney*, 760 F.2d 382, 384 (1st Cir.), *cert. denied*, 106 S. Ct. 131 (1985).

As already discussed, the language of the Treasury regulations itself gave notice that cash withdrawals over $10,000 were reportable, regardless of the number of checks used. Primary responsibility for CTR compliance in the Bank's branch offices was assigned to head tellers and branch managers. Head tellers Orlandella and Murphy, who knew of the nature of McDonough's transactions, also knew of the CTR filing obligations imposed by the Bank. The jury heard testimony from former bank teller Simona Wong, who stated that she knew McDonough's transactions were reportable, and that the source of her knowledge was head teller Murphy.

Even if some Bank personnel mistakenly regarded McDonough as engaging in multiple transactions, there was

convincing evidence that the Bank knew that his withdrawals were reportable. An internal memo sent in May 1983 by project coordinator Jayne Brady to all branch managers and head tellers stated that "'[r]eportable transactions are expanded to include multiple transactions which aggregate more than $10,000 in any *one day*.' This includes deposits or withdrawals by a customer to or from more than one account." (Emphasis in original.) The Prudential Branch Manual instructed that if Bank personnel know that a customer has engaged in multiple transactions totalling $10,000 or more, then such transactions should be regarded as a single transaction. In addition, since 1980, the instructions on the back of CTR forms have directed that reports be filed on multiple transactions which aggregate to over $10,000. Finally, a Bank auditor discussed with Orlandella and Murphy, the Bank's obligation to report a customer's multiple transactions in a single day which amount to more than $10,000. We do not suggest that these evidentiary items in themselves legally bound the Bank to report McDonough's transactions; it is the language of the regulations that impose such a duty. This evidence, however, proved that the bank had ample knowledge that transactions like McDonough's came within the purview of the Act.

Regarding the Bank's specific intent to violate the reporting obligation, Simona Wong testified that head teller Patricia Murphy knew that McDonough's transactions were reportable but, on one occasion, deliberately chose not to file a CTR on him because he was "a good customer." In addition, the jury heard testimony that bank employees regarded McDonough's transactions as unusual, speculated that he was a bookie, and suspected that he was structuring his transactions to avoid the Act's reporting requirements. An internal Bank memo, written after an investigation of the McDonough transactions, concluded that a "person managing the branch would have to have known that something strange was going on." Given the sus-

picions aroused by McDonough's banking practices and the abundance of information indicating that his transactions were reportable, the jury could have concluded that the failure by Bank personnel to, at least, inquire about the reportability of McDonough's transactions constituted flagrant indifference to the obligations imposed by the Act.

We hold that the evidence was sufficient for a finding of willfulness.

C. *Instructions Pertaining to the Bank's Post-July 1984 Conduct*

At trial, the government introduced evidence of the Bank's CTR compliance efforts after July 31, 1984, the last date on which the Bank was charged with failing to file a CTR. On August 7, 1984, the Bank learned that McDonough's transactions were being investigated by law-enforcement agencies. In addition, the branch manager and head teller were told specifically that McDonough's transactions were reportable. The government introduced evidence of the Bank's conduct after July 1984, which could be found to show scant effort by the Bank to comply with its legal obligations, even after it had learned that McDonough had come under suspicion. The Bank's failure to file a CTR on McDonough's July 31, 1984, transaction was highlighted specifically. The government argued that when the Bank was told directly by law enforcement officers on August 7 that McDonough's transactions were reportable, it should have at least completed a CTR on the July 31 withdrawal, while it still had time to meet the statute's fifteen-day filing deadline. The government also pointed to the fact that between August 1984 and May 1985 there occurred a flurry of law-enforcement activity surrounding McDonough's transactions with the Bank. The Bank, however, did not make any effort to report McDonough's 1983 and 1984 transactions until May 1985, after it recevied a federal grand jury subpoena.

This evidence was admitted originally on the Count One conspiracy charge which the trial court dismissed after all testimony had been taken. The Bank did not move to strike this evidence once the conspiracy charge was dismissed. During closing argument, the government urged that the post-July 1984 evidence manifested the Bank's disregard of its reporting duty, and thus inferentially illuminated its mental state during the time period charged in the indictment. The trial court instructed the jury that it could consider post-July 1984 conduct as probative of the Bank's intent to violate the Act. Specifically, the court told the jury that the evidence might shed light on whether the Bank had been flagrantly indifferent to its reporting obligations.

The Bank made a timely objection to this instruction. It argued that the Act's statutory and regulatory language prohibited a finding of willfulness based on evidence beyond the fifteen-day deadline for filing CTRs on reportable transactions. The Bank also avers that the judge's instructions invited the jury to convict it for acts not charged as violations in the indictment.

A common sense reading of the statute and its regulations suggests that the fifteen-day filing deadline simply marks the commencement of the offense. Federal Rule of Evidence 404(b)[7] has been held to allow the admission of acts or conduct subsequent to the offense charged to prove intent to commit

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[7] Federal Rule of Evidence 404(b) provides:

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

the alleged illegal act.[8] *United States* v. *Whalely*, 786 F.2d 1229, 1232-33 (4th Cir. 1986); *United States* v. *Hurley*, 755 F.2d 788, 790 (11th Cir. 1985); *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1149 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978); *United States* v. *Gallo*, 543 F.2d 361, 364-65 (D.C. Cir. 1976). In prosecutions for willful failure to file tax returns, for example, the element of willfulness may be shown by conduct subsequent to the date on which the return was due. *United States* v. *Sempos*, 772 F.2d 1, 2 (1st Cir. 1985); *United States* v. *Richards*, 723 F.2d 646, 648-49 (8th Cir. 1983); *United States* v. *Serlin*, 707 F.2d 953, 959 (7th Cir. 1983). We note also that the Bank's defense at trial included claims that the nonreporting of these transactions occurred accidentally or by mistake. Rule 404(b) invites the admission of relevant instances of subsequent conduct to show "absence of mistake or accident." Because the Bank did not move to strike the evidence after Count One was dismissed, and since Rule 404(b) allows the admission of subsequent conduct to show a defendant's mental state at the time of the charged offense, we uphold the district court's instruction that post-July 1984 conduct was probative of the Bank's mental state.[9]

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[8] *United States* v. *Bourque*, 541 F.2d 290 (1st Cir. 1976), relied on by the Bank, does not hold to the contrary. In *Bourque*, the issue was whether subsequent conduct by the defendant could be used to establish the *actus reus* — the failure to file a tax return on a proscribed date. In the instant case, the criminal act — the defendant's failure to file CTRs — is established. The issue is whether the Bank possessed the requisite mental state. Nothing in *Bourque* suggests that the prosecution is barred from using subsequent conduct to shed light on the defendant's *mens rea* at the time of the commission of the criminal act.

[9] We reject the suggestion by *amicus*, the Massachusetts Bankers Association, that our endorsement of the trial court's instruction makes a continuing offense out of a failure to file a CTR within fifteen days of handling a reportable transaction. The act constituting the offense is established after fifteen days. Conduct beyond the fifteen-day filing period is not relevant to whether the offensive act was committed, but only to the mental state with which the act was committed.

We also reject the Bank's contention that the trial judge's reference to the post-July 1984 evidence in her instructions regarding willfulness invited the jury to convict for conduct not charged in the indictment. Viewing the instructions as a whole, we do not think that this reference prejudiced the Bank in any significant way. The trial judge instructed the jury that it should only consider the charges specified in the indictment. She stressed that the offenses charged were thirty-one failures to file CTRs within fifteen days of handling a reportable transaction. She stated that such failures must be willful. The trial judge mentioned the post-July 1984 evidence only once, specifying that the jury should consider this evidence in connection with the element of willfulness.

In *United States* v. *Baskes*, 649 F.2d 471 (7th Cir. 1980); *cert. denied*, 450 U.S. 1000 (1981), the defendant objected to the trial judge's instruction to the jury that subsequent act evidence could be considered to shed light on the defendant's intent to commit the charged offense. The defendant urged that "additional illegalities could be inferred from the [subsequent act] evidence and . . . might confuse the issue and mislead the jury." *Id.* at 480. The Seventh Circuit upheld the charge, noting that the trial judge instructed the jury that it could only consider the evidence as it related to the defendant's intent. *Id.* at 481. It would have been preferable if the trial judge here had directly and specifically informed the jury that the post-July 1984 evidence could be considered only on the issue of the Bank's state of mind before July 1984. It is significant, however, that this evidence was mentioned only once, in direct connection with the instructions on the element of specific intent. The trial judge had already carefully instructed the jury to disregard the conspiracy charge against the defendants, which involved alleged criminal conduct by the Bank after July 1984. Moreover, the jury was given a redacted copy of the indictment which lacked any reference to conduct en-

gaged in by the Bank after July 1984, and instructed only to consider the charges, "outlined by date," specified therein. Viewed as a whole, the instructions provided sufficient guidance to the jury that the post-July 1984 evidence was relevant only to the intent with which the Bank committed the offenses charged in redacted indictment.

Affirmed.

Appendix B.

United States Court of Appeals

For the First Circuit

No. 86-1334

UNITED STATES OF AMERICA,
Appellee,
v.
BANK OF NEW ENGLAND, N.A.,
Defendant, Appellant.

JUDGMENT

Entered: June 10, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO

Clerk

[cc: Mr. Tribe and Ms. Criscitelli]

APPENDIX C

United States Court of Appeals

For the First Circuit

No. 86-1334

UNITED STATES OF AMERICA,
Appellee,
v.
BANK OF NEW ENGLAND, N.A.,
Defendant, Appellant.

Before
Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella, and Selya,
Circuit Judges,
and Pettine,* *Senior District Judge*.

ORDER OF COURT
Entered: July 6, 1987

The panel of judges that rendered the decision in this case has voted to deny the petition for rehearing.

The judges of the Court in regular active service have carefully considered the suggestion for rehearing en banc, and a majority of said judges has not ordered that the appeal be reheard en banc,

It is ordered that the petition for rehearing and suggestion for rehearing en banc be, and the same hereby is, denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

By: Richard W. Gordon
Chief Deputy Clerk

*Of the District of Rhode Island, sitting by designation.

[cc: Mr. Tribe and Ms. Criscitelli]

APPENDIX D

Excerpts from Trial Transcript of February 14, 1986

[Instructions to the Jury on "Willfulness"]

* * * * *

And, finally, the most important element really, the one on which most of the time was spent, is that the Government has to prove that the defendant willfully participated in the failure to file a report. Although the obligation to file currency transaction reports is absolute, that is, a reportable transaction has to be reported, a defendant is not criminally liable for failing to report unless the defendant knowingly and willfully participated in the failure to file the report or knowingly and willfully failed to file a report.

Knowingly simply means voluntarily and intentionally. It's designed to exclude a failure that is done by mistake or accident, or for some other innocent **[19]** reason. Willfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.

Now, both knowledge and intent refer to a person's state of mind. You cannot hear it; you can't see it; you can't smell it. You can only infer it, and you can only infer it from the person's actions and statements and the circumstances in which the person acted and spoke. So, what you will have to do with respect to Ms. Murphy and Ms. Orlandella is to look at what they said and what they did.

And let me go gack a moment, lest I confuse you. You must look separately at each defendant; you look separately at what Ms. Murphy did and said, in order to determine what her state of mind was; and you must look separately at Ms.

Orlandella and what she said and did; and, subsequently, also, Mr. McDonough to determine what his state of mind was. And do it only on the basis of the actions and statements of each of the defenants and on the basis of the circumstances surrounding their actions and statements. So, you cannot, you cannot decide that a defendant knew something based on what somebody else said. You may certainly consider what somebody else said as part of the circumstances and part of the entire picture within which the defendant acted, but what you are trying to find out is what did the defendant know, what did the defendant think, and what the **[20]** defendant's intent.

Let me try to give you an example.

Consider, for example, a very small child who's trying to build a tower of blocks and when she gets to the third block, puts it on lopsided and the whole tower comes down. The child tries several times and the tower keeps falling down, and then suddenly the child starts screaming and throwing blocks. You don't know what is in the child's mind from what the child says, but you can infer from the fact that the child had been trying and the child was unsuccessful and threw the blocks that she was angry or frustrated, or in some other way displeased.

So, here, you will have to look at all of the circumstances that surrounded the activities of Ms. Murphy and Ms. Orlandella and look at their statements and look at their conduct and determine from them whether the Government has proven that they knew about the regulation and that they willfully, that is, with an intent to disobey the law, violated it, failed to file the reports.

Now, both of the defendants say that they did not know that the law required the reporting of multiple check transactions, and, indeed, that others at the bank didn't know it either. The element of knowledge may, however, be inferred from evidence that a defendant deliberately closed her eyes with a

conscious purpose to avoid learning about the [21] requirements which would otherwise have been obvious to her. In other words, you may, but you do not have to, infer knowledge from a defendant's willful blindness to the requirement. You cannot infer knowledge simply because a person may have been negligent or may have been stupid, or may have made a mistake. But if you find beyond a reasonable doubt that either Ms. Murphy or Ms. Orlandella was aware to a high degree of probability that reports were required under the circumstances of this case, then you may infer that she acted with knowledge.

Ms. Murphy and Ms. Orlandella have introduced evidence tending to establish their good reputations for honesty and integrity as head tellers at the bank. You may consider this with all the other evidence in determining their guilt or innocence. Such evidence, taken with all the other evidence you have heard, may create a reasonable doubt as to their guilt, and you may consider it in that context.

Let me summarize. If you find that the Government has proven beyond a reasonable doubt that the bank was involved in a currency transaction exceeding $10,000 on or about the day charged, that no report was filed, and that the defendant you're then considering knowingly and willfully participated in the failure to file the report, then you must find that defendant guilty of that charge. If you find that the Government has not proven each of the three elements as [22] to any defendant or as to any count, then you must find the defendant not guilty on that count.

Let me turn to the bank. The elements with respect to the counts against the bank are substantially the same as those I've just outlined to you, with one addition. The first element is again that the bank at about the time alleged was involved in a currency transaction of more than $10,000. The second element is again that no report was filed within the time re-

quired. The third element is again that the bank willfully failed to file and that Mr. McDonough willfully participated in the failure to file a report.

The fourth element is new: That the failure to file the report as to a particular transaction was part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period; that the failure to file the report as to —

(Whereupon, Juror No. 6 requested the instructions be repeated.)

THE COURT: Where do you want me to start?

JUROR NO. 6: The illegal activity, the fourth.

THE COURT: Okay. The first two elements are exactly the same: that there was a currency transaction, the bank was involved in a currency transaction of more than $10,000; that no report was filed is two; three, that the bank willfully failed to file a report or that Mr. McDonough **[23]** willfully participated in the failure to file a report; four, that's the new one, four, that the failure to file a report as to a particular transaction was part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period.

I will say nothing more on one and two, because we covered those extensively, and the considerations here are identical to what I have already told you. With respect to three, the requirement of willful action, with respect to Mr. McDonough, you have to judge whether he acted knowingly and willfully by the same process that you used to judge whether Ms. Murphy and Ms. Orlandella acted willfully; that is, you have to discern his state of mind: Did he use multiple checks with the knowledge that the transaction had to be reported and with the intent that the bank, nevertheless, omit reporting it; that is, did he willfully participate in any willful failure by the bank to report.

The Government has to prove that Mr. McDonough intended to violate the law by what he did. It is not enough for the Government to show that he intended to avoid the law if he

honestly thought that if he used checks of less than $10,000, no reports needed to be filed. That is, taking advantage of what a person honestly thinks is a loophole in the law is not a willful violation of the law, even if the person is wrong about the loophole. Also, Mr. McDonough **[24]** can't be found guilty of willfully participating in an offense if you find that the bank was not guilty. He can't willfully be guilty of participating in something that turns out not to be a crime. So, if you find the bank not guilty as to any count, then Mr. McDonough cannot be found guilty of that count. He can be guilty only if the principal, the bank in this case, is found guilty with respect to any particular count in which he's also charged.

The bank is in a different position. It is a corporation. And it acts through its officers, employees, and agents. The bank is responsible for the acts of each employee, but it is also responsible for its conduct as an institution. So, to determine whether the bank acted knowingly and willfully, you have to look, first, at the state of mind of the bank's officers, employees, and agents, who are acting within the scope of their employment. As I think Mr. Markham or one the lawyers pointed out, that's an important concept: An employee acts within the scope of his employment if he performs duties he is generally assigned to perform, and he intends, thereby, to benefit the corporation. It doesn't matter whether the corporation is in fact benefitted, so long as he intends that the corporation be benefitted.

Now, let me talk about the concept of knowledge in the context of the bank. In deciding what the bank knew of **[25]** C.T.R. filing requirements, look first at the conduct and statements of each employee, regardless of his or her level of responsibility, and decide whether when acting within the scope of his or her employment the employee knew of the requirement in the context of multiple checks. You can look

at all of the employees of the bank. And if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, as I have defined it to you.

In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So, if you find that an employee within the scope of his employment knew that C.T.R.s had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

There is a similar double business with respect to **[26]** the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did nor did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file.

In this connection, again review the conduct of the various employees who had responsibility for C.T.R. filing and determine in the same manner as you did with respect to Ms. Murphy, Ms. Orlandella, and Mr. McDonough what their state of mind was, what they intended, and then make the judgment as to whether anybody willfully failed to file any of these reports that are at issue in this case.

Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing C.T.R. requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the **[27]** evidence as to bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; it's response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies.

You should consider separately the evidence as to each of the transactions that is charged in the indictment and consider separately whether the Government has proven a willful failure by the bank to file reports with respect to each transaction and, also, then, of course, with respect to Mr. McDonough, whether the Government has proven his willful participation in each of these.

If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

* * * * *

[30] If you have any questions about anything I've told you in the course of your deliberations, please write them out and let the marshal know, I will then try to answer them, either by bringing you down here and reexplaining something **[31]** or by sending you a note, always with the consent of counsel.

Mr. Harris?

JUROR NO. 3: I have one question right now, in terms of the bank, the third item, I'm not quite clear as to whether it has to be the bank willfully and Mr. McDonough participating in order for —

THE COURT: With respect to the bank, if you find that the bank acted willfully, either because you find that an employee knew of the requirement and willfully failed to file a report or because you find that the bank as an institution was plainly indifferent to its obligations, then you may find the bank guilty. It has nothing to do with Mr. McDonough. Mr. McDonough was only the one who happened to bring in the multiple checks. But in judging Mr. McDonough, you have to look at what he did.

Does that make it clear?

JUROR NO. 3: Right. It's not both of those things, and Mr. McDonough doesn't have to enter into it in terms of the bank being guilty.

THE COURT: No, no.

* * * * *

APPENDIX E

Excerpts from Trial Transcript of February 14, 1986

[Instructions to the Jury on "Pattern"]

* * * * *

Now, let me just briefly talk about the last element, that having to do with the pattern of illegal activity involving transactions of more than $100,000. Pattern simply means repeated transactions. One transaction is not a pattern; two may not be either, but if you get a series of transactions, that may then be a pattern. And in this context, what we're talking about is a pattern of **[28]** repeated failures to file required reports on these transactions.

The Government must prove that the transactions involved more than $100,000 in a 12-month period. No one transaction has to be greater than $100,000, so long as the total of the transactions is in any 12-month period. It's a shifting period, so you can look at any period that you want. And if within that period, transactions of more than $100,000 occurred and there was a willful failure to file with respect to them, then this fourth element has been satisfied.

So, if you find that a series of transactions occurred that required the filing of reports and that the total of such transactions in any 12-month period involved more than $100,000, this element is satisfied, even if no one transaction itself exceeded 100,000 dollars. It is kind of a fillip on the multiple business. So, if you find that a reportable transaction occurred, that no report was filed, that transaction may be considered as part of the pattern if others occurred and if in any 12-month period the total was more than $100,000.

Again, in summary, if you find, one, that the government has proven beyond a reasonable doubt that the bank was at

the time alleged involved in a currency transaction; two, that no report was filed; three, that the bank acted **[29]** willfully, and Mr. McDonough participated willfully; and that the transaction was part of a pattern involving transactions of more than $100,000, then you must find the defendant guilty of that particularly count.

* * * * *

No. 87-368

Supreme Court, U.S.
FILED
OCT 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions on knowledge and willfulness were erroneous.

2. Whether, under a prior version of 31 U.S.C. 5322(b), individual violations of the Bank Secrecy Act could properly be prosecuted as felonies, where each such violation was "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 821 F.2d 844.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on June 10, 1987. A petition for rehearing was denied on July 6, 1987 (Pet. App. A32). The petition for a writ of certiorari was filed on September 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner, a corporation, was convicted on 31 counts of failing to file currency transaction reports (CTRs), in violation of 31 U.S.C. 5313 and 5322, and was fined $40,000 on each count, for a

total fine of $1,240,000.[1] The court of appeals affirmed (Pet. App. A1-A30).

1. Under the Bank Secrecy Act and the regulations promulgated under it, financial institutions must file a CTR whenever they are "involved in a transaction for the payment, receipt, or transfer of United States coins or currency" in excess of $10,000 (Pet. App. A2; 31 U.S.C. 5313(a); 31 C.F.R. 103.22(a) (1985)).[2] At the time of petitioner's offenses, the Act made it a misdemeanor for a financial institution willfully to fail to file a CTR (31 U.S.C. 5322(a)), but the Act imposed felony liability when that failure was "part of a pattern of illegal activity

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[1] Co-defendants James McDonough, Carol Orlandella, and Patricia Murphy were acquitted on all charges. The trial court also directed a verdict of acquittal on Count One of the indictment, charging petitioner and others with conspiring to conceal from the Internal Revenue Service 36 reportable currency transactions. Pet. App. A3-A4.

[2] 31 U.S.C. 5313 provides, in pertinent part:

> § 5313. ***Reports on domestic coins and currency transactions***
>
> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

The regulation in effect at the time of petitioner's violations provided (Pet. App. A2 n.3):

> § 103.22 ***Reports of currency transactions***
>
> (a)(l) Each financial institution, other than a casino, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

involving transactions of more than $100,000 in a 12-month period" (31 U.S.C. 5322(b)).[3]

2. Petitioner (the Bank) is a financial institution with several branches in and around Boston, Massachusetts. The evidence at trial established that on 31 occasions between May 1983 and July 1984 co-defendant James McDonough, a bank customer, withdrew more than $10,000 in cash from a single account at one branch of the Bank. In each instance, McDonough presented multiple counter checks to a single bank teller and received in return a lump sum of currency in excess of $10,000. Pet.

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[3] The statute then in effect provided:

§ 5322. *Criminal penalties*

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

Section 5322 has twice been amended since the time of petitioner's offenses. In 1984, Section 5322(a) was amended to provide for a fine of not more than $250,000, a term of imprisonment of not more than five years, or both. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 901(b), 98 Stat. 2135. In 1986, Section 5322(b) was amended to increase the maximum prison term to ten years and to replace the words "illegal activity involving transactions of" with the words "any illegal activity involving." Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1357(g), 100 Stat. 3207-26. The latter change was designed to make clear that Section 5322(b) applied to violations of any unlawful activity involving more than $100,000, not just to violations of the Bank Secrecy Act. See S. Rep. 99-433, 99th Cong., 2d Sess. 20 (1986).

App. A3.[4] Petitioner failed to file a CTR for any of those transactions (*id.* at A5).

The evidence showed that the Bank's employees and agents knew that CTRs must be filed for currency transactions in excess of $10,000.[5] In addition to the instructions to that effect on the CTR form itself,[6] in May 1983 a memo was distributed to branch managers and head

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[4] McDonough would frequently telephone in advance to alert the tellers that he planned to withdraw a specific amount of cash, because the tellers normally did not keep such substantial cash reserves on hand (C.A. App. 297-298, 772-773, 1003-1004, 1431, 1774). Withdrawals also required the approval of a head teller or platform employee, who would initial the request (*id.* at 285-287, 291, 295, 389-402, 510-511, 794, 1431, 1433). The head tellers knew which transactions required CTR filings based on the teller requests for cash approval (*id.* at 868-869).

[5] Petitioner suggests in passing (Pet. 4) that at the time "it was far from clear" that McDonough's withdrawals were reportable under the Bank Secrecy Act. As the court of appeals observed (Pet. App. A5-A12), that is simply not so. To be sure, some courts have held that the reporting obligations under the Act do not extend to bank customers (see, e.g., *United States* v. *Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986)), or to transactions in excess of $10,000 that are executed at different banks (see, *e.g.*, *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986)), at different bank branches (see, *e.g.*, *United States* v. *Larson*, *supra*; *United States* v. *Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States* v. *Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986)), or on different days (see, *e.g.*, *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985)). To our knowledge, however, no court has ever held that a financial institution may escape liability under the Act when it fails to file a CTR for a transfer of currency in excess of $10,000 to a single customer, at a single bank branch, on a single day.

[6] Each CTR states (C.A. App. 2428):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

tellers—the persons primarily responsible for CTR compliance (see C.A. App. 209-210, 212, 737, 791, 1594-1595, 1771)—stating that multiple transactions by the same person occurring at different times on the same day should be aggregated and, if they totalled in excess of $10,000, should be reported (C.A. App. 2317).[7] The Branch Manual and the Tellers' Manual, both readily available to petitioner's employees, also gave instructions on filing CTRs (C.A. App. 373, 2336, 2359, 2380). Moreover, in 1981 and again in 1983, a bank auditor discussed with the branch head tellers the difficulties in detecting multiple transactions executed at different times and different branches, and explained how the employees should comply with the CTR rules when multi-check transactions were involved (C.A. App. 877-881, 886-892). The Bank's president acknowledged at trial that he understood the Bank's reporting obligations, and he stated his belief that transactions like McDonough's were reportable. See, *e.g.*, C.A. App. 1582, 1585-1587, 1593, 1616.[8]

The Bank's employees and agents were also well aware of McDonough's frequent and unusually large cash withdrawals. McDonough was the only bank customer of the branch who withdrew funds by using counter checks, rather than pre-coded checks. In addition, he commonly used multiple checks when one check would clearly have been sufficient. C.A. App. 294, 307-308, 509, 753. The personnel in the branch speculated that McDonough was a "bookie" and concluded that he presented the multiple checks in order to evade the CTR requirements (C.A. App.

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[7] Copies of this memorandum were found in the files of petitioner's Prudential Branch, at which the McDonough transactions occurred (C.A. App. 1242).

[8] The court of appeals found that these facts provided "convincing evidence that the Bank knew that [McDonough's] withdrawals were reportable" (Pet. App. A25).

190-199, 214-217, 748-755, 757, 762, 784, 1766, 1850, 1894-1896, 1899-1901, 1917).[9] On one occasion a line teller asked the head teller whether a CTR should be filed for one of McDonough's multiple-check cash withdrawals. After consulting with the branch manager, the head teller replied that no CTR should be filed because McDonough was a "good customer" who would get "mad" if a form were filed (Pet. App. A25; C.A. App. 1011-1014, 1027, 1051, 1099-1100). It was not until May 1985, after it had received a federal grand jury subpoena and months after a state grand jury had subpoenaed bank employees, that petitioner filed reports on McDonough's transactions (Pet. App. A26; C.A. App. 1319-1321, 1383, 1578).

3. The trial court instructed the jury on knowledge and intent, both with respect to the individual defendants and with respect to the Bank. The court emphasized that knowledge cannot be shown by a mere "failure that is done by mistake or accident, or for some other innocent reason" (Pet. App. A33). The court then explained (*id.* at A34-A35):

> The element of knowledge may * * * be inferred from evidence that a defendant deliberately closed her eyes with a conscious purpose to avoid learning about the requirements which would otherwise have been obvious to her. In other words, you may, but you do not have to, infer knowledge from a defendant's willful blindness to the requirement. You cannot infer knowledge simply because a person may have been negligent or may have been stupid, or may have made a mistake.

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[9] On one occasion, McDonough objected when a teller prepared a CTR, and he complained to Bank officials that he did not want the government to learn of his business (C.A. App. 614-618, 641-645, 657, 683-689, 692-693, 710-712).

The court next focused on the Bank, explaining (*id.* at A37-A38):

> The bank is * * * a corporation. And it acts through its officers, employees and agents. The bank is responsible for the acts of each employee, but it is also responsible for its conduct as an institution.
>
> * * * * *
>
> Now, let me talk about the concep of knowledge in the context of the bank. In deciding what the bank knew of * * * C.T.R. filing requirements, look first at the conduct and statements of each employee, regardless of his or her level of responsibility, and decide whether when acting within the scope of his or her employment the employee knew of the requirement in the context of multiple checks. You can look at all of the employees of the bank. And if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, as I have defined it to you.
>
> * * * So, if you find that an employee within the scope of his employment knew that C.T.R.s had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

The court then explained the element of willfulness. It first charged that "[w]illfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law" (Pet. App. A33). When it focused on the Bank, the court instructed (*id.* at A38-A39):

In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file.

* * * * *

Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing C.T.R. requirements. The Government has to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the * * * evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies.

* * * * *

If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

4. The court of appeals unanimously affirmed (Pet. App. A1-A30). It rejected the contention (*id.* at A19-A24)

that the trial court's instructions effectively relieved the government of its burden of proving that petitioner had acted willfully. The court of appeals explained (*id.* at A23) that the instructions, "when viewed as a whole, directed the jury not to convict for accidental, mistaken or inadvertent acts or omissions." Rather, the court observed, the instructions were consistent with this Court's cases defining willfulness, in both civil and criminal contexts, as " 'a disregard for the governing statute and an indifference to its requirements' " (*id.* at A23-A24 (citations omitted)). The court of appeals also held (*id.* at A17-A19) that the 31 McDonough transactions had been properly charged as separate felonies, because each of those offenses was "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period" (31 U.S.C. 5322(b)). The court found (Pet. App. A17) that that construction "comports with the plain language of the statute and its legislative history and has solid precedential support."[10]

ARGUMENT

1. Petitioner contends (Pet. 7-12) that by instructing the jury that a corporation's knowledge and willfulness may be predicated on evidence of "flagrant indifference," the trial court effectively relieved the government of the burden to prove specific intent.[11] The court of appeals

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[10] The court of appeals also held that the Bank Secrecy Act applied to McDonough's cash withdrawals (Pet. App. A4-A12), that the trial court's instruction on the statutory "pattern" element was not defective (*id.* at A12-A16), that the evidence of willfulness was sufficient (*id.* at A24-A26), and that certain evidence had been properly admitted (*id.* at A26-A30). The petition does not present those issues.

[11] Petitioner also asserts (Pet. 9) that the "threshold" of willfulness was "dropped even lower" when the trial court stated in a supplemental instruction that petitioner could be found to have acted willfully if "as an institution [it] was plainly indifferent to its obligations"

correctly rejected that argument.[12]

The trial court referred to "flagrant organizational indifference" when it instructed the jury on the theory of

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(Pet. App. 40). The court gave that supplemental instruction, in response to a juror's inquiry, to make clear that petitioner's intent should be evaluated separately from the intent of co-defendant McDonough. Read in context, that single, brief instruction did not amend the court's earlier instructions on conscious avoidance. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *United States* v. *Toner*, 728 F.2d 115, 124 (2d Cir. 1984); *United States* v. *Guillette*, 547 F.2d 743, 750 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977). Moreover, in objecting at trial to the supplemental charge, petitioner did not claim that "plain indifference" reflects a lower level of intent than "flagrant organizational indifference." See C.A. App. 2071-2072. It may not rely on any such distinction now. See *United States* v. *Kallash*, 785 F.2d 26, 28-29 (2d Cir. 1986) (general objection to a conscious avoidance charge is insufficient to preserve challenge to a particular error in the charge). See also *United States* v. *Markowski*, 772 F.2d 358, 363 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986); *United States* v. *Swafford*, 766 F.2d 426, 429 (10th Cir. 1985); *United States* v. *Hecht*, 705 F.2d 976 (8th Cir. 1983). Indeed, petitioner itself used the terms interchangeably at the charging conference (C.A. App. 1946-1947, 1949, 1954-1955), and in closing argument (*id.* at 2000); see also *id.* at 2011, 2023-2024). Cf. *United States* v. *Lemire*, 720 F.2d 1327, 1343 (D.C. Cir. 1983), cert denied, 467 U.S. 1266 (1984).

[12] In passing, petitioner also challenges (Pet. 9) the court of appeals' conclusion (Pet. App. A22) that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability." Petitioner does not, however, dispute that the lower federal courts have routinely approved that instruction in similar cases. See, *e.g.*, *Riss & Co.* v. *United States*, 262 F.2d 245, 250 (8th Cir. 1958); *St. Johnsbury Trucking Co.* v. *United States*, 220 F.2d 393 (1st Cir. 1955); *Inland Freight Lines* v. *United States*, 191 F.2d 313, 315 (10th Cir. 1951); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974); *United States* v. *Sawyer Transp., Inc.*, 337 F. Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1975). Accord Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1248 (1979).

"conscious avoidance." The court explained (Pet. App. A38-A39) that the element of willfulness may be established either by showing that one of petitioner's employees acted willfully or, alternatively, by proving that "the bank as an organization consciously avoided learning about and observing C.T.R. requirements." In making the latter showing, the trial court stated (*id.* at A39), the government would have to establish that the bank's failure to file was the product of "some flagrant organizational indifference."

The courts have routinely approved conscious avoidance instructions in criminal cases "where a defendant has claimed lack of some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance" (*United States* v. *Lanza,* 790 F.2d 1015, 1022 (2d Cir. 1986), cert. denied, No. 86-5129 (Oct. 6, 1986)). Moreover, it is not at all uncommon for conscious avoidance charges to define "deliberate ignorance" as "indifference"—whether flagrant or otherwise—to the obligations of law. See, *e.g.*, *United States* v. *Schiff,* 801 F.2d 108, 112-113 (2d Cir. 1986), cert. denied, No. 86-1026 (Mar. 30, 1987) (approving conscious avoidance charge on element of willfulness in criminal tax case; charge instructed the jury that it "may consider whether or not the Defendant displayed a deliberate indifference or refusal to be informed"); *United States* v. *Schaffer,* 600 F.2d 1120, 1121 (5th Cir. 1979) (in prosecution for making false statements, court held that " 'reckless indifference' can be equated with 'knowingly and willfully' ").[13]

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[13] See also *United States* v. *Hathaway,* 798 F.2d 902, 911 (6th Cir. 1986) (misrepresentation element of mail and wire fraud may be satisfied by proof that statements were made with reckless indifference as to their truth or falsity); *United States* v. *Boyer,* 694 F.2d 58, 59 (3d Cir. 1982) (in mail fraud and securities fraud prosecution, court approved instruction that "reckless indifference is the equivalent of intentional misrepresentation"); *United States* v. *Demauro,* 581

This Court approved a similar definition of "willfulness" in *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938). In that case, the Court upheld a fine on a corporation charged with willfully confining cattle during interstate travel for a period longer than federal law allowed. The Court held (303 U.S. at 243 (citations omitted)) that "willfully" meant " 'purposely or obstinately and is designed to describe the attitude of [a defendant] who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' "[14]

Petitioner claims (Pet. 11-12) that a jury instruction using the phrase "flagrant indifference" may convert "[v]irtually every * * * lack of communication" into a "multi-million dollar fine[]." That prediction, however, is needlessly overdrawn. The trial court explained to the jury at the outset (Pet. App. A33) that an offense must be committed "knowingly" and "willfully" in order "to exclude a failure that is done by mistake or accident, or for some other innocent reason." Simple "omissions" (Pet. 11),

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F.2d 50, 54 (2d Cir. 1978) (corporate criminal liability under the Bank Secrecy Act may be established by proof that the bank's supervisory employees "acted with plain indifference" to the law). Cf. *United States* v. *Gold*, 743 F.2d 800, 822 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985) (conscious avoidance charge on knowledge was warranted in medicare fraud case where "the record was replete with testimony that suggested indifference by the defendants at best and deliberate criminality at worst").

[14] Petitioner seeks to distinguish the *Illinois Central* case, claiming that the present case involves a "fiscal offense" (Pet. 10), and therefore requires proof of "evil purpose," which cannot be satisfied by evidence of "flagrant indifference." But the Court in *Illinois Central* described "willfulness" under the statute as " 'intentional, or knowing, or voluntary' " conduct (303 U.S. at 243 (citation omitted)), precisely the same standard that the Court has since applied to the "fiscal offense" of tax evasion. See *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam). It is hard to see why evidence of " 'plain[ ] indifferen[ce]' " (303 U.S. 243 (citation omitted)) would be sufficient in one setting but not the other.

without more, would not constitute "willfulness" within the meaning of those instructions. Thus, when "viewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)), the reference to "flagrant indifference" has none of the dramatic implications that petitioner assigns to it.

2. Petitioner next contends (Pet. 12-16) that this Court should review the question whether under 31 U.S.C. 5322(b) the Bank was properly charged with a separate felony for each of the 31 McDonough currency transactions. That issue warrants no further review.

a. At the time of petitioner's offenses, 31 U.S.C. 5322(b) provided that "[a] person willfully violating this subchapter or a regulation prescribed under this subchapter * * * as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both." Because McDonough's unreported cash transactions aggregated to more than $100,000 in each 12-month period, the Bank was charged with 31 felony violations, one for each of the 31 transactions.

The plain language of the statute authorized a separate charge for each of those transactions. The version of Section 5322(b) that was in force at the time of petitioner's offenses proscribed "violations" of the Bank Secrecy Act, when those violations were "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period." It was the individual violation, and not the "pattern of illegal activity," that was the focus of the proscription. See *United States* v. *Kattan-Kassin*, 696 F.2d 893, 895-896 (11th Cir. 1983). By contrast, when Congress has sought to criminalize a pattern of activity, rather than simply an individual violation, it has done so expressly. See 18 U.S.C. 1962(c) ("pattern of racketeering activity"); 21 U.S.C. (& Supp. III) 848 ("continuing criminal enterprise"). Because there is thus nothing "unclear" (Pet. 13) about the statutory language, petitioner's reliance on the

rule of lenity (*id.* at 15-16) is misplaced. *United States* v. *Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170 (1920).

Petitioner contends, however, that the language of the statute must be construed in light of Congress's intention to punish more severely those offenses " 'involv[ing] very large sums of money' " (Pet. 14 (citations omitted)). It therefore concludes (*ibid.*) that liability under Section 5322(b) should depend on "the amount of money involved" and not on "the number of trips to the bank." Petitioner has set up a false dichotomy, however. Liability under Section 5322(b) plainly turns on both the dollar amount of the crime and the existence of a "pattern" of offenses. Congress determined that repeated offenses under the Bank Secrecy Act should receive greater punishment than an isolated violation, and it therefore incorporated in the statute the requirement that there be a "pattern" of illegality. Had Congress been concerned solely with the dollar amount of the unreported transactions, it surely would not have added a pattern element to the offense.[15]

b. Petitioner also asserts (Pet. 12-14) that the circuits are in conflict concerning the proper interpretation of Section 5322(b). That claim, however, is premised on a misreading of two decisions of the Ninth Circuit.

In *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979), the defendants were charged with four felony counts, arising from a series of violations of the Bank Secrecy Act committed over a four-year period. The district court

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[15] Petitioner also bases its reading of Section 5322(b) on the assumption (Pet. 15) that Congress did not intend to enact a statute in which "there could never be a single felony." But first, the statute does not *require* multiple charges; the decision as to how many counts to charge rests, as it often does, with the prosecutor. In any event, the complaint that nobody can commit just one felony is not a sufficient reason to ignore, as petitioner does, the plain language of the statute.

dismissed the felony counts, concluding that a violation of the Bank Secrecy Act may be prosecuted as a felony only when it is committed in conjunction with violations of other criminal statues. The court of appeals rejected that analysis and reinstated the felony charges. It held (596 F.2d at 878) that "a series of misdemeanor violations of the act may, by themselves, call forth the increased penalties" under the Act. However, because the government had charged only four felonies in the case—each corresponding to a separate 12-month period—the court had no occasion to decide whether the individual unreported transactions could have been prosecuted as separate felonies. The Ninth Circuit has confirmed that limited reading of the *Beusch* case. See *United States* v. *So*, 755 F.2d 1350, 1355 (9th Cir. 1985).

The Eleventh Circuit thereafter addressed the same issue in the *Kattan-Kassin* case, on which the court of appeals in the present case relied (Pet. App. A18-A19). There, the court approved an indictment treating each of several violations of the Bank Secrecy Act as a felony because each was "part of a pattern of illegal activity involving transactions exceeding $100,000 in a 12-month period." The court concluded (696 F.2d at 898) that the plain language and legislative history of the statute "clearly indicated that each violation could be prosecuted as a separate felony."

The Ninth Circuit next considered the issue in *United States* v. *So*, *supra*. In that case, the government charged the defendants with two misdemeanor counts and four felonies, apparently on the theory that only after the first two violations did the defendant's total transactions exceed $100,000. The court was therefore required to decide in *So* only the question whether the government was free to charge a separate felony for each transaction above the $100,000 limit. Relying on the Eleventh Circuit's decision

in *Kattan-Kassin* (755 F.2d at 1355), the court concluded that the felony charges were proper. The court did not, however, announce a general rule that violations of the Bank Secrecy Act may not be treated as felonies until the $100,000 threshold has been reached (Pet. 14). That broader question was simply not presented in the case.[16]

The decision of the court below is expressly consistent with *Kattan-Kassin* (see Pet. App. A19). Moreover, because the holding of the Ninth Circuit in *So*, following the decision in *Kattan-Kassin*, was simply that multiple felony charges may be brought within a 12-month period under the Bank Secrecy Act, that court's decision is likewise consistent with the decision below.[17]

Even if there were some tension between the Ninth Circuit cases and the decision in this case, this would not be an appropriate case in which to address that issue. As we have noted, Congress amended Section 5322(b) in 1986, using more expansive language to describe the pattern of illegal activity necessary to trigger the felony provisions of that section. The change in the statutory language makes it appear even clearer that each reporting violation is a felony if it is committed as part of a pattern of illegal activity that involves a total of $100,000 within a 12-month period, regardless of whether the reporting violation at issue occurs at the outset of that pattern of illegal activity or at the end, after the $100,000 amount has been reached. In light of the new statutory language, there is no need for this Court to grant review for the purpose of construing the version of the statute that was in effect prior to 1986.

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[16] In that respect, the court of appeals in the present case described the holding in the *So* case too broadly. See Pet. App. A18.

[17] To our knowledge, the Ninth Circuit has never held that felony charges may be brought only for transactions that occur after the $100,000 threshold is crossed in a particular 12-month period.

In any event, as the court below noted (Pet. App. A18), the Bank's total fine in this case did not exceed what it could have received even under petitioner's interpretation of *So*. Petitioner recognizes as much (Pet. 14), but contends (*id.* at 15-16) that under the Ninth Circuit's decision in *Beusch* the Bank could have received only one fine for each 12-month period. As we noted above, however—and as the Ninth Circuit confirmed in the *So* case—the court in *Beusch* did not announce any such rule.

Finally, there is no support for petitioner's speculation (Pet. 16) that "the sentence (of $40,000 *per* count) might well have been lower, and the jury less prone to convict, had fewer counts been charged." The transcript of the sentencing proceeding offers cold comfort to petitioner's hypothesis. The trial court explained that "[t]he fines authorized are substantial, and * * * Congress intended that fines under the section * * * have a real economic impact; in short, that they be of a magnitude that cannot be written off as merely a cost of doing business" (C.A. App. 2115-2116). Because the court found that the Bank's offenses "resulted * * * from a systematic disregard of cash reporting requirements[]" (C.A. App. 2117-2118), it determined that "something more than a very modest fine * * * [was] appropriate" (C.A. App. 2118).

There is likewise no evidence to support the supposition that the jury might have acquitted petitioner if fewer offenses had been alleged. First, there is no reason to suppose that the prosecutor would have charged fewer offenses simply because many of them, under petitioner's theory, would have been misdemeanors. Second, there is no basis to assume that a well-instructed jury, following the trial court's instructions, would have been less prone to convict simply because fewer charges were contained in the indictment. See C.A. App. 2049. Cf. *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6; *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967); *Opper* v. *United States*, 348 U.S 84, 95 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Two points in the Government's Brief in Opposition require brief reply. *First*, the Government defends the trial court's equation of "organizational indifference" with corporate specific intent by asserting that "organizational indifference" is just a new brand of "conscious avoidance," and that "[t]he courts have routinely approved conscious avoidance instructions in criminal cases . . .." Govt. Opp. 10-11. With due respect, this assertion wholly misses the point of the first Question Presented.

Petitioner Bank of New England has never for a moment disputed that an *individual* defendant may be found to have acted with specific intent when he has deliberately closed his eyes or ears to legal obligations. That is, of course, the point of the seven cases the Government cites to support its claim that "conscious avoidance" charges are "routine[ ]" — each and every one of which involved an *individual* as opposed to a corporate defendant. *See* Govt. Opp. 11-12 & n.13. Had this been a conviction of an *individual* defendant for "conscious avoidance," "willful blindness," "deliberate indifference," or the like, no serious question would have been presented.

The question that is worthy of certiorari here is *not* whether an *individual* may be convicted of a specific intent crime on the basis of his own "'deliberate indifference'" (*see* Govt. Opp. 11), but rather whether a *corporation* may be convicted of a specific intent crime on the basis of its "*organizational* indifference." This is a question of importance not only to the Bank of New England in this case, but to every corporation that may face charges of any crime for which Congress has required specific intent.

This question cannot be resolved by simple analogy to cases involving individual defendants, as the Government would have it. For unlike Messrs. Lanza, Schiff, Schaffer, Hathaway, Boyer, Demauro, and Gold — the individual human defendants in the cases stressed by the Government (Govt. Opp. 11-12 & n.13) — a corporation cannot deliberately wink at, blind, or deafen itself to its legal obligations. Unlike Messrs. Lanza, Schiff, Schaffer, Hathaway, Boyer, Demauro, and Gold, a corporation has no eyes or ears to close.[1]

[1] The Government does make brief mention of one case that did involve a corporation, *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938) (cited at Govt. Opp. 12). But that case provides no guidance here. In that case, the Court did hold that a railroad's "indifference" was enough to show "willful" violation of a statute requiring railroads to unload cattle quickly from their trains. As this Court has noted, however, the term "willful" does not mean the

Nor can the question be resolved by treating the instruction on "organizational indifference" as a vicarious liability instruction. Quite plainly it was not. The trial court *did* give a vicarious liability instruction, in which it stated that the Bank could be found to have acted willfully "if one of its employees in the scope of his employment acted willfully." Pet. App. A38. Petitioner of course concedes that such vicarious liability may be imposed — whether the employee has acted willfully *or* been willfully blind. Had the instruction stopped there, the first Question in the Petition would never have been presented. The first Question is presented only because the trial court went on to give its novel *corporate* "conscious avoidance" and *corporate* "organizational indifference" instructions as a wholly separate and independent basis for conviction — one ex-

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same thing in every federal statute, and "[a]id in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used." *United States* v. *Murdock*, 290 U.S. 389, 395 (1933).

There can be no serious argument that Congress meant "willfullness" in the context of $100 to $500 fines for livestock safety infractions to mean the same thing as "willfulness" in the context of CTR crimes, for which it imposed fines a hundred times greater and substantial prison terms. *First*, as this Court stated in *Illinois Central* itself, far more is required to show "willfulness" in crimes "involving turpitude" than in those involving railway safety and the like, where mere employee "negligence or oversight" may be enough to support a finding of corporate "willfulness." 303 U.S. at 242, 244. *Second*, the very lower court decisions favorably cited by the Government have expressly reiterated this point. *See, e.g.*, *Riss & Co.* v. *United States*, 262 F.2d 245, 249 (8th Cir. 1958) (noting that "willful" truck driving infractions may rest on a showing of mere "indifference," but "willful" tax evasion may not); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 740 (W.D. Va. 1974) (same) (both cases cited at Govt. Opp. 10 n.12). *Finally*, the lower courts have unanimously held that felony violations of the currency transaction reporting laws, like tax crimes, are plainly crimes of the "turpitude" rather than the "public safety" type, as the Government nowhere attempts to deny. *See* Cert. Pet. 7-8 & n.10 (citing lower court cases), 10-11. Accordingly, the Government's weak attempt (*see* Govt. Opp. 12 & n.14) to equate this case with a cattle-car case must fail.

pressly "[a]lternative[ ]" to vicarious liability.[2] No plausible reading of the challenged instruction could reduce it to one about imputing individual employees' own "indifference" or "avoidance" to the corporation.[3]

Precisely because a corporation is *not* an individual, the trial court's invitation to the jury to convict the Bank for "organizational indifference" amounted to an invitation to convict the Bank for negligence. Congress's limitation of criminal punishment under the currency transaction laws to cases of specific intent, however, contemplated no such thing. The First Circuit's judgment affirming conviction under that instruction accordingly requires review by this Court.

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[2] After the unchallenged instruction on vicarious liability (Pet. App. A38), the trial court stated:

> *Alternatively*, the bank *as an institution* has certain responsibilities; *as an organization*, it has certain responsibilities. And you will have to determine whether the bank *as an organization* consciously avoided learning about and observing C.T.R. requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant *organizational* indifference.

Pet. App. A39 (emphasis added). It is only this latter, alternative instruction that Petitioner contests.

[3] The Government suggests that any error in this instruction was cured by the trial court's boilerplate language at the beginning of the instructions on willfulness. *See* Govt. Opp. 12-13. Because those stock phrases occurred some eight pages of transcript and three defendants earlier in the charge, the Government's contention can hardly be taken seriously.

The Government also attempts to trivialize the trial court's supplemental instruction (*see* Govt. Opp. 9-10 n.11), which reduced the threshold of intent still lower, from "flagrant" to "plain[ ]" indifference (Pet. App. A40). But as Justice Frankfurter wrote for this Court, a trial court's supplemental instruction in response to a juror's question is critical, for "in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating charge . . . ." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946).

The *second* point in the Government's opposition brief that requires reply is the wholly unfounded assertion that the language of 31 U.S.C. § 5322(b) is "plain" about how many felonies a "pattern" involves. *See* Govt. Opp. 13-14 & n.15. That statute is in fact undeniably ambiguous on that point.[4] The Government makes the statute "plain" only by misquoting it.

Contrary to the Government's contention, the "plain language" of § 5322(b) does *not* "proscribe[ ] '*violations*' of the Bank Secrecy Act" that are part of a pattern. Govt. Opp. 13 (emphasis added). And likewise contrary to the Government's contention, nothing in the "plain language" of that statute makes "the individual *violation* . . . the focus of the proscription." *Id.* For § 5322(b) nowhere uses the term "*violation*" at all. Rather it states, in full, that:

> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

The statute thus simply does not say, as the Government would have it, that each "violation" in a pattern is an offense warranting a separate fine of up to half a million dollars. Nor, of course, does it say that each "pattern" is such an offense. Instead, it is ambiguous. It says that "[a] person willfully violating" the CTR laws "as part of a pattern" is liable for such an offense, but it does not say how many times over. It leaves that question open.

[4] Notwithstanding the Government's vague suggestion (*see* Govt. Opp. 16), the statute's amendment in 1986 (described fully at Govt. Opp. 3 n.3) made no dent whatever in this ambiguity.

Accordingly, contrary to the Government's argument (*see* Govt. Opp. 13-14), the rule of lenity should apply here in full force (*see* Cert. Pet. 6-7, 16). Just as in baseball, ties go to the runner, in the criminal law, "ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). As Justice White observed for this Court just last Term, "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 107 S. Ct. 2875, 2881 (1987). Congress has not so spoken here. Neither prosecutors nor lower federal courts are free to speak for it.[5]

The lower court thus violated principles not only of due process and fair warning, but also of the separation of powers, when it read the harshest possible unit of punishment into the ambiguous silence of 31 U.S.C. § 5322(b).[6] Only this Court's

[5] The Government suggests that the division among the circuits described in the Petition (Cert. Pet. 13-14) can be ignored because the circuit courts were not announcing "general rule[s]" (Govt. Opp. 16), but were simply ratifying acts of widely disparate prosecutorial discretion (*see* Govt. Opp. 15, noting that the "question [was] whether the government was free" to charge multiple felonies). This proposition cannot be accepted. For criminal punishment can no more be imposed under an ambiguous statute by shifting Congress's responsibilities to the executive branch than it can by shifting them to the courts. *Cf. City of Houston* v. *Hill*, 107 S. Ct. 2502, 2511 & n.15 (1987).

[6] The Government's and the lower court's reading of the statute was a full order of magnitude harsher than the reading of the statute urged by Petitioner. Under 31 U.S.C. § 5322(a) at the time at issue in this case, a single willful CTR violation was a misdemeanor punishable by a fine of no more than $1000. Thus had the Bank been convicted of thirty-one unrelated violations, it would have been liable for no more than a $31,000 fine. If § 5322(b) is read to subject "pattern" violators to a single felony violation, the less harsh reading, then the Bank's maximum fine for a "pattern" of thirty-one violations would have been multiplied 16 times to $500,000 — a quite substantial enhancement, by any standard. But if § 5322(b) is read in the harshest possible way, as the Government and both courts did below, then the maximum fine for thirty-one violations is multiplied not 16 but 500 times, from $31,000 to over $15 million. The legislative history supports a view that Congress wanted substantial enhancement for "serious violations" involving "large sums of money" (*see* Cert. Pet. 14), but the Government can point to no evidence that Congress had such draconian enhancement in mind.

review can restore the task of clarification from the lower federal courts to the Congress, where it belongs.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, and in this Reply, this Court should review and reverse the decision of the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the Congress intended to allow the conviction of a corporation for a specific intent crime in the absence of evidence that any of its employees consciously chose to violate the law.

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge the Court to grant the Petition for Writ of Certiorari in order to review a decision of the United States Court of Appeals for the First Circuit.

That decision upheld a jury verdict convicting the Bank of New England of thirty-one violations of the Currency Transaction Act, 31 U.S.C. Sections 5311 to 5322 (1982). The Act, better known as the Bank Secrecy Act, and its implementing regulations require

financial institutions to report individual withdrawals or deposits involving $10,000 or more to the Secretary of the Treasury on Treasury Department-designed forms called currency transaction reports or "CTRs." In order to avoid reports to the Treasury by financial institutions, some enterprising individuals have broken up large currency deposits or withdrawals into multiple increments, each amounting to less than $10,000, but totalling more than $10,000 when aggregated. These have come to be known, in jargon, as "structured transactions."

In this case, a bank customer presented a series of checks to the bank, no one of which exceeded $10,000. The checks, *totalling* over $10,000, were presented to the bank at the same time and to the same teller or tellers, who, in turn, permitted the customer to withdraw over $10,000 in cash. The bank tellers who took part in these transactions were indicted and tried for the offense of "willfully" failing to file currency transaction reports. These tellers were acquitted, having testified that they did not know that the transactions, under those circumstances, were reportable events. (See Pet. for Cert. at 5, n. 7 and citations therein.)

With respect to the bank itself, the trial judge instructed the jury that it could convict the bank under either of two theories: The bank would possess the requisite "knowledge" to be guilty of the offenses charged "if an employee knew of the requirement and willfully failed to file a report" (Pet. for Cert., Appendix D, A40). Alternatively, the judge instructed that the jury could convict the bank based upon "the sum of the knowledge of all of the employees." (*Id.* at A38). While possible, it is extremely unlikely that the bank was convicted under the first theory, since

the tellers were acquitted. It is more probable that the bank was found guilty under the "collective knowledge" theory, the propriety of which is a question of federal law of sufficient magnitude as to warrant the attention of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. There are member banks of the American Bankers Association located in each of the fifty states and the District of Columbia, including banks chartered by the Comptroller of the Currency (national banks) and banks chartered by the states in which they are located (state banks). As such, it frequently appears in litigation, either as a party or as amicus curiae, in order to promote or represent the interests of the commercial banking industry at stake in such litigation.

Prior to recent and appreciated "clarifications" of the Treasury Department's currency transaction reporting requirements (the regulations which required disclosure to Treasury of all cash transactions over $10,000), a number of banks suffered civil penalties (and this criminal conviction) for failure to guess correctly as to the meaning of the regulations. Even with such "clarifications" the currency transaction reporting requirements remain a matter of great concern to the industry.

Member banks of the American Bankers Association are subject to a multitude of regulatory obligations which have made a bank's compliance officer a

most critical position in every institution.[1] Commercial banks spend millions of dollars each year to train their employees and establish detailed programs for compliance with these regulatory obligations. The industry's compliance with regulations is also a matter of concern for Congress. For a six year period, banking's treatment of its obligations under the Bank Secrecy Act was a matter of regular Congressional attention, and the subject of various hearings and reports.[2] Yet at no point in this period has Congress ever indicated that "organizational indifference" can result in a will-

[1] The listing of regulatory requirements are voluminous and include: (a) Truth in Lending, Regulation Z; (b) Equal Credit Opportunity, Regulation B; (c) Consumer Leasing, Regulation M; (d) Electronic Funds Transfer Act, Regulation E; (e) Credit Practice Rule, Regulation AA; (f) Real Estate Settlement Procedures Act (RESPA), Regulation X; (g) Variable Rate Mortgages; (h) Fair Credit Reporting Act; (i) Fair Housing Act; (j) Community Reinvestment Act; (k) Home Mortgage Disclosure Act, Regulation C; (l) Funds Availability; (m) Truth in Savings Act; (n) Truth in Lending: Credit Card Application Disclosure. To address this critical area, the American Bankers Association has a National Compliance School and series of Compliance Seminars and Symposium designed to train compliance officers each year.

[2] *Statement of Honorable John M. Walker, Assistant Secretary for Enforcement and Operations, Department of the Treasury, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking, Finance and Urban Affairs* (July 13, 1982). H. R. Rep. 99-746, Comprehensive Money Laundering Prevention Act (1986). S. Rep. 99-433, The Money Laundering Crimes Act of 1986 (1986). H. R. Rep. 99-855, Money Laundering Control Act of 1986 (1986). President's Commission on Organized Crime, Interim Report, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984). As recently as May 6, 1987, the House Banking Subcommittee on Financial Institutions Supervision, Regulation and Insurance held hearings on the regulatory and enforcement agencies progress on money laundering.

ful violation of the statute. In contrast, Congress created a new lesser offense of "negligent" violations of the reporting requirements—in 1986. 31 U.S.C. Section 5321(a)(6). Organizational indifference is, however, the burden which will be imposed on the banking industry if the First Circuit's opinion is allowed to stand.

In addition, the potential reach of the First Circuit's unique theory of "collective knowledge" will result in the inability of bankers to establish compliance policies designed to prevent the prosecution of an institution for any number or variety of "specific intent" offenses where no single employee or agent has the necessary knowledge to satisfy a statutory requirement but an "aggregate" of knowledge is imputed to an institution. While the use of "collective knowledge" as a theory of corporate criminal liability casts a wide net, with the potential of ensnaring the entire business community, exposure of the banking industry to prosecution is of direct consequence to our association.

SUMMARY OF THE ARGUMENT

The reasons for granting a writ of certiorari in this case are well set forth in the petition. The decision in the First Circuit creates a new class of activities covered by the "collective knowledge" and "indifference" theories of corporate criminal liability. As more and more statutes are enacted to create and define banking crimes,[3] the theory of collective knowledge becomes dangerously expansive and could produce "nightmarish results."[4] As the Petitioner so clearly establishes, the decision "threatens convictions for negligent inaction not only under the currency transaction reporting laws, but also under every federal criminal statute that has until now been limited by standards of specific intent." Pet. for Cert. at 11. The resulting penalties for CTR violations (as well as the plethora of other banking regulations) are being imposed on the industry without any clear guidance to bankers and their counsel as to how to comply.

The recent adoption of criminal statutes affecting banking have subjected the industry to the potential for arbitrary government action. Collective knowledge or flagrant indifference theories of liability will force the industry to guess futilely at their obligations under the law. There can be no safe harbor from prosecution when well settled criminal standards are disregarded. In addition, these theories create the po-

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[3] *See, e.g.*, 18 U.S.C. 1956, 18 U.S.C. 1957, 18 U.S.C. 215, 18 U.S.C. 1344.

[4] *See* J. Villa, *Banking Crimes: Fraud, Money Laundering, and Embezzlement* (Clark Boardman & Co. 1987) § 6.05(3)(b). Villa describes the potential abuse of the theory under the newly enacted 18 U.S.C. 1957.

tential for direct conflict with the banking industry's long held obligations of protecting its customers privacy.[5]

ARGUMENT

Collective Knowledge

The First Circuit upholds a conviction of a bank for failure to file CTRs on cash withdrawals. The penalties imposed upon the bank could only be assessed for a *willful* violation of 31 U.S.C. Section 5322. The willfulness standard was found to be satisfied even though the bank's employees and its customer were found not guilty of failing to file CTRs on certain transactions. The court stretched all rational interpretation by explaining that: "[t]he bank is also deemed to know it [the CTR requirements] if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed." (Pet. for Cert., Appendix D, A38).

To comprehend fully the implications of this novel approach to corporate criminal liability, it is helpful to look at a recent interpretation of this standard:

> [E]mployee A in the compliance department at a bank's home office understood the filing requirement of the BSA [Bank Secrecy Act]; meanwhile,

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[5] The Right to Financial Privacy Act (RFPA), Title IX, Pub. L. No. 95-630, 92 Stat. 3641 codified at 12 U.S.C. §§ 3401-3422 (1982) is the major statute in this area but financial privacy is also governed by other federal law, state constitution and statutory law and the common law. *See, e.g., Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

> employee B, a teller in a branch office 50 miles away, conducted a reportable transaction but failed to recognize it as such and thus did not prepare a report; and employee C, the assistant branch manager in charge of filing Form 4789s with the IRS, did not file such a form because he was totally unaware that a reportable transaction had occurred. Although each element of the BSA offense has been satisfied by one or another of the employees of the bank, no individual intended to violate—or in fact violated—the law. Nevertheless, corporate liability could arguably be claimed to attach under a collective knowledge theory of BSA liability. This will not satisfy the requirement of a "willful" violation, as required by the BSA, unless the courts take the second step and allow aggregation of intent.[6]

As this example clearly illustrates, where (as in the BSA) "knowledge" is the sole mens rea element necessary, use of the collective knowledge standard can produce "nightmarish results." *Id.*

The disastrous implications of the collective knowledge theory are amply illustrated by its application to one of the several criminal statutes created during the last Congress. Under the new 18 U.S.C. Section 1957, any person who "knowingly" engages or attempts to engage in a monetary transaction involving criminally-derived property over $10,000 in value and derived from specified unlawful activity is subject to fine and imprisonment. There is only a knowledge requirement under section 1957. If the collective knowledge theory is upheld by this court, a bank could

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[6] Villa at § 6.05(3)(b) 6-58 to 6-59.

face criminal liability where one employee knew that an individual was in possession of criminally derived property (but not that the individual was, or would become, a bank customer) and another employee innocently conducted a transaction for the individual without knowing the source of funds.[7]

The First Circuit has departed from the decisions of other circuits with its adoption of the collective knowledge theory in the case of a specific intent crime. The only previous decisions utilizing this theory are cases where "public safety" was at issue.[8] As a matter of fact, the Second Circuit clearly addressed the use of the collective or "cumulative" knowledge theory in banking and rejected it out of hand (*as did the government*). In *United States v. Banco Cafetero Panama,* 797 F.2d 1154 (2nd Cir. 1986), the government brought an action for forfeiture of amounts in bank accounts as proceeds traceable to narcotics transactions. There, as in the case at bar, the statute in question contained a "knowledge" requirement.[9]

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[7] Villa at § 6.05(3)(b) 6-59. The author goes on to point out that the extremely harsh penalties under BSA make it unlikely that Congress wanted to punish violators under a collective knowledge theory for specific intent crimes.

[8] *United States v. T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730 (W.D. Va. 1974). *See also Inland Freight Lines v. United States,* 191 F.2d 313 (10th Cir. 1951); *United States v. Sawyer Transport, Inc.,* 337 F. Supp. 29 (D. Minn. 1971). For an extensive analysis of these cases, *see* K. Brickey, *Corporate Criminal Liability,* Vol. 3 § 4:05 at 93-97 (Callaghan & Co., 1984).

[9] The statute (21 U.S.C.§ 881) dealing with forfeiture provides in pertinent part: "All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in

The Court in *Banco* pointed out that it agreed with the government's concession that "the bank's knowledge . . . is *not* the cumulative knowledge of all the bank's employees." In fact, the court stated that: "[f]or a bank to be vulnerable to forfeiture of its cash, the fact that particular funds are immediate or traceable drug proceeds and the fact that those funds have been deposited at the bank must be known to the *same* employee of that bank." (emphasis added). In further support of the industry's position in the present case, the Second Circuit added: "banks need not engage in costly internal control procedures to ensure that one employee does not accept funds for deposit that another employee, who is unaware of the deposit, knows to be tainted." *United States v. Banco,* 797 F.2d at 1162.

Flagrant Indifference

As the argument above clearly demonstrates, the use of collective knowledge in the context of corporate criminal liability is untenable and should be rejected. Equally suspect is the district court's jury instruction which calls for a finding of willfulness where "flagrant indifference" by the bank is established.

If the court accepts the theory of flagrant indifference as a basis for liability in specific intent crimes,

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violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

the banking industry will not be able to comport with its well settled duty to maintain the confidentiality of customer information and bank records.[10] The threat of a charge of "organizational indifference" which could result in the imposition of severe penalties under several recently enacted statutes will force the industry to report all types of activities to the government.

The continued maintenance of a right to financial privacy will fall in the face of the governmental desire to receive all customer records for investigations,[11] The prosecutorial freedom that arises from easy access to records will result in chaos. The courts will be faced with increased litigation from customers who have had their records disclosed for a variety of reasons. This will fly in the face of Congressional intent, expressed in the Right to Financial Privacy Act, to protect customers of financial institutions from "unwarranted intrusion" into their financial records while, at the same time, permitting legitimate law enforcement activity.

Forcing corporations to choose between violation of customer privacy and being assessed heavy penalties for an "intentional" violation of law that the bank is powerless to prevent cannot be the goal of the gov-

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[10] Our association has long supported customer privacy. In 1940, the General Counsel of the American Bankers Association said: "A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification." (cited in *Milohnich v. First National Bank of Miami Springs*, 224 So.2d 759, 761 (Fla. Dist. Ct. App. 1969)).

[11] L. Richard Fischer, *The Law of Financial Privacy: A Compliance Guide* ¶ 2.01 (1983).

ernment. The First Circuit's decision failed to address these obvious concerns. That result must be overturned.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Writ should be granted.

Respectfully submitted,

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